THE

ORPHANS' COURT SYSTEM,

AS REPORTED TO THE

House of Assembly of the State of New-Jersey,

FEBRUARY, 1835,

AND AS

APPROVED AND AGAIN REPORTED TO THE

LEGISLATIVE COUNCIL,

By their Committee,

JANUARY, 1841.

SOMERVILLE, N. J.

STEPHEN L. B. BALDWIN, PRINTER.

1841.

TO THE LEGISLATIVE COUNCIL

OF THE

STATE OF NEW-JERSEY.

The undersigned committee of Council, to whom was referred the Orphans' Court System heretofore reported to the Legislature, and postponed for future consideration ; in discharge of the duty assigned to them, submit the following report.

The subject is of the utmost importance, and merits the anxious attention of the Legislative authority. It is second to none that can claim the action of the sagacious law-giver, or the upright judge.

The public councils of this State have for a long time manifested the deepest anxiety on this interesting theme.

In the year 1798 and for a few years anterior thereto, the late Judge Patterson was engaged in the revision of the statute laws of this State.

The House of Assembly requested him to draw for them an Orphans' Court law, and to report an entire system. That great man declined the office, and stated as a reason, that he had never practised as attorney, solicitor or counsel, in these Courts ; and he advised that application should be made, to some gentleman of the legal profession, familiar with such practice.

On this suggestion, Chief Justice Kinsey was appointed to perform this important duty. He undertook it, but his age and infirmities were not equal to the arduous and laborious task. He died without making any report.

After his death, Governor Bloomfield accepted the same appointment. The act of the 9th Nov. 1803, was the fruit of his labors.

Little need be said of that. It has on all hands been condemned, as repugnant and jejune in its principles ; and uncertain and delusory in its details. Its inartificial and unskillful structure, language and character, marked it for early decease. Its death was not regretted.

Between that time and 1812 divers other attempts were made to improve the system—all were abortive.—Vain are the efforts to patch up a vicious and ruined constitution until the deadly malady be removed.

In 1812 the Legislature again took up the subject, and requested Governor Ogden to revise the system, and make report.

The United States were then engaged in public war. *Inter arma silent leges*, and nothing was done.

In the winter of 1815 Governor Pennington at the instance of the House of Assembly renewed the attempt. But as no report was made by him, and as he was during the same year made District Judge it is not known what progress he made.

The act of 1817 was the result of the labors of a Committee, and was adopted from mere necessity.

That act and its various supplements, amendments, and alterations, altho' intended in themselves to be of temporary duration and character, have continued to constitute the law in New-Jersey until this hour.

In 1823 the late Chief Justice Kirkpatrick was appointed to the same trust and duty.

What progress he made is not known. His death put a period to the appointment, and it was conferred upon his successor, Chief Justice Ewing.

It cannot be doubted but that these profound jurists and lawyers, felt the responsibility and importance of the task committed to them.

It was more than a year after his appointment, that the latter gentleman wrote to the Legislature, enlarging upon the subject, stating its magnitude and necessity.

The interests he says are immense ; the evils terrrible.

The great and prevailing reason which he assigns after such a length of time for declining the office, shows how deeply and almost awfully he was impressed with its importance.

"I cannot consent, (he says,) to give these questions a mere hasty perusal—I should deem it highly culpable to devote to them mere ordinary labor and attention—my official duties and engagements forbid that I should dedicate that laborious investigation, and painful care, which are necessarily required—I cannot therefore perform the duty."

He proceeds to add the weight of his name and character to the

testimony derived from a thousand other sources; and he urges the Legislature to cause the work to be begun at the very foundation, and not to stop, or hesitate, until the deplorable evil is radically removed.

The commission, report and work, here again reported, resulted out of this advice.

The change is great.—The provisions are oftentimes new and are very important.

A prudent and perhaps a jealous precaution, induced the Legislature, after even a laborious investigation, to postpone the bills reported for future deliberation.

The committee readily admit; nay, even insist, that extreme and guarded caution, is necessary as well in the substance, as in the language, of provisions so important, so novel, and so interesting: and they deeply regret that this principle, wise and salutary in itself, should be perverted from its legitimate object, and should prevent the enactment of just and wholesome laws.

This should not be.

Time has rolled on—years have glided away—but the evil remains in all its unblest odour.

As an incubus, it seems to rest upon our State, and almost stagnates the fountains of justice.

The widows and the orphans of our land are still unprotected—still undefended—unavenged.

Their wrongs are our reproach, and our shame.

Has not the time at length arrived, when the legislature of New-Jersey are required to act with promptness, and with vigor?

Is it not now past all peradventure, that there must be a reform in the Orphans' Court laws?

It is worse than superfluous to descend into particulars to show the evils endured, the uncertainty of settlement, the vagueness, the irregularity, and the unlawful form, as well as substance of decrees.

The committee have been obliged to see them, feel them, and deeply to deplore them.

They could not turn away their eyes, and they feel constrained to add their testimony to the united voice of New-Jersey. That the Orphans' Courts as now existing from the highest to the lowest, exhibit such a mass of incongruity, contradiction, error and injustice, that they can no longer be endured.

The system now again reported has been extensively circulated. It has been examined, critically examined, by judges and jurists,

sages and lawyers, and so far as the committee have heard or been able to learn, it has in its principles been universally approved. It is due to the suggestion of some very discreet and intelligent friends to state that they object to one provision in the reported bills.

They propose that four Judges of probate, be appointed by the Joint Meeting for the State at large.

That it shall be their duty to execute the numerous and important functions proposed to be committed to the Justices of the Supreme Court; and they add that for these purposes it will be convenient to divide the State, into districts of four or five counties each. In support of this measure they urge strong and powerful reasons.

They tell us that the Justices of the Supreme Courts have already their time and attention fully occupied—That their circuits are numerous and embarrassing, and that not unfrequently do they interfere with each other—That the Judges already have too little time, gravely and maturely, to examine the important questions argued and discussed at the bar; and that if their occupations in the counties must be augmented by this immense, and difficult addition, the business *in bank*, already protracted and delayed, must suffer and languish—That the civil, canon, and ecclesiastical law, and the vast variety of matters committed to the Orphans' Courts, are very different from the common law—That intimate and familiar acquaintance with the latter, by no means insures a profound and practical knowledge of the former.

To this reasoning the Committee have no reply. There is much truth and much wisdom in the suggestion. It is a grave and an important question, on which they at present give no opinion.

They did not feel themselves at liberty, without particular instructions to that effect, to propose the appointment of four salary officers whose compensation ought to be equal at least to that of the Justices of the Supreme Court.

But if this measure shall be deemed proper and right, it will be seen that a slight alteration in that bill only, which provides for the constitution of the Orphans' Court, will effect the desired object.

The alteration will touch no other bill, either in principle or in detail.

J. W. SCOTT,
D. HAINES,
P. VREDENBURGH, Jun.

January, 1841.

To the Honorable the Legislative Council and General Assembly of the State of New-Jersey.

Under an Appointment and Commission from his Excellency the Governor, I prepared and reported to the Legislature, early in the month of February last, for their inspection and revision, eleven Bills, entitled respectively as follows, viz.

1. An Act concerning the Ordinary and the Prerogative Court.
2. An Act concerning the Orphans' Courts.
3. An Act concerning Surrogates.
4. An Act concerning Wills.
5. An Act concerning Executors and Administrators.
6. An Act concerning the descent and distribution of the Estates of Intestates.
7. An Act for the more just and equal distribution of the Estates of deceased Insolvents.
8. An Act relative to Dower.
9. An Act concerning Guardians.
10. A Supplement to the Act relative to the Supreme and Circuit Courts.
11. An Act to establish Superior Courts of Common Pleas.

The Commission was very broad and expansive, and required me to revise, amend, and digest, one entire portion of our jurisprudence, so far as respects the statute law. Descent, distribution, dower, guardianship, legacy, testament and intestacy; as well as the principles of practice in the Courts, to which matters of this nature are properly committed, were obviously within the scope of the appointment.

The House of Assembly referred the Report, together with the Bills, to a highly intelligent and respectable committee. That committee devoted much time and attention to the important and interesting questions submitted to them; and finally made their report, approbatory of the system and of the principles reported in the Bills: And they recommended, that a large number of copies of the Bills should be printed—that a liberal circulation of them should be made, during the recess of the Legislature, and that various public functionaries should be supplied with copies.

The House, by resolution, directed this to be done. The Committee also requested, and advised me, to annex to each of the Bills, remarks and notes explanatory, and sometimes historical, in relation to the important principles there involved.

This duty I have endeavored faithfully to perform ; and the work is now submitted to the wisdom of the Legislature.

I cannot but regret that the notes and remarks are so much *in extenso ;* but I found it impossible to condense them within smaller compass, without an entire failure to do justice to the subject. I should indeed apprehend that I had trespassed immeasurably on the patience and attention of the Legislature, if I had not at the same time a deep and almost painful sense of the importance of the subjects. It ought not to be forgotten, that the amount of wealth and property constantly passing through the Courts, to which attention is here called, is enormous. That, on an average, all the property of the citizens of the state is adjudged of in them once in about twenty years: That widows, orphans and others, who are incapable of spreading their complaints abroad, or of defending themselves against the wily arts of fraud and cunning, are the suitors and not unfrequently the victims. Hence we are prepared for the sequel of the appalling tale, that *there* the most flagrant injustice has been committed, and for a long course of years "repeated and re-repeated, in the semblance of equity and under the forms of law."

May I not be allowed to add, that in our land public opinion is the ultimate arbiter. Great deference is due to *that.* Many notes, remarks, explanations and criticisms, are justly introduced in reference to that, which the superior knowledge of those to whom they are immediately addressed, must render entirely superfluous.

That the Legislature have acted on this principle, is very obvious. They have required that an extensive circulation should be given to the work : and, as far as it has been practicable, their command has been obeyed.

The remaining copies of the bills, not distributed according to the direction of the House of Assembly, have been delivered to the Treasurer, for the use of the Legislature.

It cannot escape the attention of the Legislature, that several things have been omitted, and manifestly by design.

1. I have not taken notice of the statute 13th June, 1830, entitled an act further regulating the descent of real estates.—R. L. 774.

By the first section it is enacted, that in case of a devise to one for life, with remainder to his *heirs*, or to the *heirs of his body*, the life estate shall be good; but after the determination of that, the lands devised shall go to the children of *such devisee*, as tenants in common in fee.

A series of questions arise upon this section. What shall become of the *estate in remainder* created by the devise? What is the destination of the estate, if the tenant for life shall die, *leaving no issue?* It may easily happen that there shall be no *issue*, and yet there may be *heirs capable of inheriting*. Must the inheritance go to the *right* heirs of the tenant for life? Or must his brothers and sisters be cut off? If the estate shall go to the *right* heirs, then must the common law rule of *male preference* and *primogeniture* prevail? Or has the succession of the *right* heirs been totally interrupted? And must the estate *revert* by force of the statute? Or must it *escheat?* These and others arising, are questions of no easy solution.

Difficulties of a precisely correspondent character, may arise under the second section.

That the interference of the Legislature is required, is past all doubt; but without some intimation of their pleasure on the subject, it is impossible to revise that statute with effect.

2. There are no repealing clauses introduced into the bills reported. This is a work of time, and requires great care and attention. It cannot well be done, until it shall be seen what alterations in the existing systems it shall please the Legislature to adopt.

3. No alteration is made in the fee bill, nor is there is any provision for the fees due for the many new services required. This cannot be done satisfactorily, until it is known what shall be accepted and what rejected.

It ought also to be added, that so many supplements, alterations and additions, have been made in relation to the act regulating fees, that it has become difficult to be understood, independent of all the inconveniences arising from its scattered character.

It is very respectfully suggested to the Legislature, that it

would tend greatly to convenience, and would abridge many disputes, to revise that entire subject; and to bring all the matters connected with it into one statute. This was strongly recommended by Judge Patterson in the year 1799, and the Legislature *then* acted on his recommendation.

J. W. SCOTT.

New-Brunswick, Sept. 30th, 1834.

AN ACT

Concerning the Ordinary and the Prerogative Court.

SECTION I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. The Ordinary of this State shall have full power and authority, to take the proof of the last wills, testaments and codicils, of all deceased persons whatsoever; and to make, adjudge and record, probate on the same:

2. And to grant letters testamentary according to law:

3. And to grant letters of administration, of the goods and chattels, rights and credits, at the time of their death, of all persons dying intestate:

4. Or, with the will annexed, when the same shall be requisite:

5. And, also, to grant letters of Guardianship, of the persons and estates, of Orphan Children, and in all other proper cases.

6. Such letters testamentary, letters of administration, and letters of guardianship, shall be in the nature of commission, and shall be made in the name of this state, and tested in the name of the Ordinary, and sealed with the seal of the Prerogative Court.

SEC. II. *And be it enacted, by the authority aforesaid,* That—

1. Every person appointed an administrator, by the Ordinary, except when administration shall be granted to a husband, of the goods, chattels and credits of his wife, shall, before receiving letters, execute a bond to this state, with two or more sufficient sureties, to be approved by the Ordinary, and to be jointly and severally bound.

2. The penalty in such bond shall not be less than twice the value of the personal estate of which the deceased died possessed, or entitled unto.

3. The Condition of the said bond shall be such as is, or hereafter shall be, prescribed by law.

4. Every person, who shall be appointed by the Ordinary, a guardian of the person and estate of an orphan child, or children, shall before receiving letters, in like manner, execute a bond to this state, with two or more sufficient sureties, to be approved by the Ordinary, and to be jointly and severally bound.

5. The penalty in such bond shall be such as the Ordinary in his discretion shall direct, having respect to the amount of the personal estate, and the yearly value of the real estate of the ward or wards.

6. The condition of said bond shall be such as is, or hereafter shall be, prescribed by law.

7. In addition to the security above required from administrators and guardians, every person who shall receive letters testamentary, letters of administration, or letters of guardianship from the Ordinary, except, in case of a husband administrator of the goods, chattels and credits of his wife, shall before receiving letters, become bound to this state by recognizance, in such sum as the Ordinary shall direct, upon condition, that such executor, administrator, or guardian, as the case may be, shall and will, well and faithfully execute the trust reposed in him as such executor, administrator, or guardian, and will faithfully obey all such orders and decrees, as the Prerogative Court may make, of, and concerning the administration of the estate so committed to him, or of, and concerning the care and custody of the person and estate of the ward so committed to him, as the case may be.

8. The recognizance, or recognizances, before mentioned, may be taken before the Ordinary, or before any one of the Masters of the Prerogative Court, hereinafter provided for, and shall be binding and obligatory upon all and every of the recognizors, and upon all their lands, tenements, hereditaments and real estate, according to the terms of the recognizance, wheresoever in this state, the said lands, tenements and hereditaments may lie, or be situate.

9. And the said bonds, so as aforesaid, to be executed by administrators and guardians ; and the recognizances, so as aforesaid, to be entered into by executors, administrators and guardians, shall be for the security, use, interest and benefit, of all and every person who shall be aggrieved in and through the default, delinquency, unfaithfulness, negligence, or insolvency of the said executors, administrators, or guardians, respectively.

10. Before letters testamentary, letters of administration, or letters of guardianship, shall issue, the executor, administrator, or guardian, as the case may be, shall take and subscribe an oath, or affirmation, before the Ordinary, or before one of

the Masters of the Prerogative Court, that he will faithfully and honestly discharge the duties of such executor, administrator, or guardian.

Sec. III. *And be it enacted by the authority aforesaid,* That—

1. The Ordinary shall, at stated periods, hold a Prerogative Court, at the times and places appointed, or that shall hereafter be appointed for holding the Court of Chancery, and at such other times and places, as in his discretion, shall seem meet and expedient; to the end, that he may therein hear, and finally determine, all causes that shall come before him, either in original jurisdiction, or by appeal.

2. In respect to executors, administrators and guardians, who shall receive their letters from the Ordinary, the Prerogative Court shall have and exercise original and exclusive jurisdiction:

3. To hear and determine all controversies touching and concerning the truth, fullness and fairness of inventories:

4. To require and compel the production and exhibition by any executor, or other person, of any last will, testament, or codicil, or other paper, in the nature of a last will, testament, or codocil, in his possession, or under his control; to the end, that the same may be inquired into, and examined, and proved, according to right:

5. To correct and amend all errors and mistakes in the accounts of executors, administrators and guardians, and to decree the allowance and settlement of the said accounts, when amended and corrected, according to law:

6. To compel executors and administrators faithfully to administer the estates committed to them, and to pay the debts of their testators and intestates, so far as they shall have assets for the same:

7. To decree the payment or delivery of legacies, or the abatement of the same, in whole, or in part; and to order and decree payment of the part not abated, with interest and costs, where interest and costs ought to be allowed:

8. To decree and order distribution of surplus estate, after payment of debts:

9. To compel guardians to account, from time to time, and as often as need be, with their respective wards, and to pay as the Court shall direct, or to invest, under the order of the Court, all balances that shall on account be found justly due:

10. To take order for the relief of wards, touching their persons and estates, against delinquent, negligent, unfaithful, or insolvent guardians :

11. To authorize and empower guardians, where, on due examination it doth, or shall appear, that the personal estate of their wards, together with the yearly income of their real estate, are insufficient for the proper education, maintenance and support of such wards, to sell, mortgage, or lease, the real estate of such wards, or any part thereof, in the discretion of said Court :

12. To remove from office, by order and decree and supersedeas thereon, if need be, on just cause, and on reasonable terms, delinquent, defaulting, negligent, unfaithful, or insolvent executors, administrators, or guardians, and in their discretion, to appoint other administrators and guardians, if need be, in their stead :

13. And to compel obedience to the decrees and orders of the said Court, by attachment, injunction, *ne exeat*, execution against body, execution against goods and lands, or all of them, or by other proper remedial writ, from time to time, to be devised by the said Court, in legal discretion.

SEC. IV. *And be it enacted by the authority aforesaid*, That—

1. The Secretary of this State, shall be the Register of the Prerogative Court ; and shall attend the sittings of the said Court, at the stated terms thereof ; shall register and enrol the decrees, and other proceedings of the said Court, proper to be enrolled ; and shall do such other acts, as by law and the practice of the Court, shall be required of him.

2. of the Masters of the Court of Chancery, to be selected and designated by the Ordinary, in and by rule of the Prerogative Court, shall be, and hereby are constituted, Masters of the said Court.

3. The Ordinary may in his discretion, and at his pleasure, from time to time, alter and vary such selection, provided, that there shall be at no time more than Masters of the Prerogative Court.

4. It shall be the duty of the said Masters, and they, and each of them, shall have full power and authority to take in writing, on oath, or affirmation, the examination of all parties, witnesses, or other persons, required or permitted to testify, or

to be examined, before the Prerogative Court, or any one of its officers. And the said Masters shall also do, and perform, all such other acts and things, as by law, or the practice, or rule of the said Court, shall be required of them, respectively.

5. All sheriffs, coroners, constables, and elizors, shall be, and hereby are declared to be, the ministerial officers of the Prerogative Court; and shall execute the writs, precepts and process issuing out of said Court, and to them respectively directed and delivered.

Sec. V. *And be it enacted by the authority aforesaid,* That—

1. To the end, that all persons in interest, may have a full and fair opportunity to contest the accounts of executors, administrators and guardians, as well in the inventory and appraisement, as in the charge and discharge; no account reported by any executor, administrator, or guardian, without citation, monition, or process against him for that purpose, shall be decreed, or finally passed upon, until after such reasonable notice as the Prerogative Court shall by rule direct.

2. All executors and administrators, after the expiration of twelve months from the time of the issuing of their respective letters, may be required to render account.

3. And for this purpose, any creditor, legatee, next of kin, devisee, heir, or other proper person, may petition for monition, citation, or other proper process, to answer and account, and the same shall be accorded.

4. Obedience to the said process of the Court, may be compelled by fine, imprisonment and distress infinite.

5. On service of the citation, monition, or other process, according to law, and the same being returned and certified to the Court, the executor, administrator, or guardian, or other person required to account, may be considered as in Court, and may be proceeded against forthwith, according to law and the rules of the Court.

6. If any executor, administrator, or guardian, shall avoid, or evade the service of process to answer and account; or shall reside out of this state, so that he cannot be served with process, then it shall be lawful for the Court, by rule, to direct reasonable publication, and to adjudge the same, constructive service of the process, and thereupon to proceed against the said executor, administrator, or guardian, as being in Court

7. Exceptions may be taken and filed against the accounts of executors, administrators, or guardians, exhibited in the Prerogative Court, within such time as the Court shall by rule direct. And the same may be inquired into, examined, and finally decided by the Ordinary in the Prerogative Court; or the said accounts and exceptions, may by rule of the said Court be referred to a Master to report thereon; to the end, that the Ordinary may decree in the premises, according to equity and good conscience.

8. The Ordinary shall have full power to cause to come before the Prerogative Court, or before any Master, or other officer of the said Court, all parties and witnesses, and them, or any of them to examine, or cause to be examined, on oath, or affirmation, touching or concerning any matter or thing in the said accounts, or exceptions specified or set forth, or otherwise, there in controversy; and if any party, witness, or other person, shall in such examination swear or affirm falsely, or corruptly, such party, witness, or other person, shall be deemed guilty of wilful and corrupt perjury; and on conviction shall be punished as such.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. Whenever in the opinion of the Ordinary, it shall be necessary, or proper, to have a trial by jury, he shall have full power and authority to form issues for the trial of controverted matters of fact, and the same issues to try by jury at the bar of the Court, or the same to send into any proper and convenient county, to be tried before any one of the Masters of the Court, specially to be designated for that purpose. And the trial to be at such time and place as the Ordinary shall direct.

2. The Prerogative Court shall have power to confirm the said verdict, and to render judgment thereon, or for just cause, to set the said verdict aside, and a new trial grant, on equitable terms, and according to right.

3. The verdict of a jury so to be taken on any controverted facts, when confirmed and approved by the Court, shall be conclusive as to the facts therein found to be true, by the said jury, so far only as respects the parties and privies to the said issue.

4. For the purpose of carrying into effect the foregoing power, the Prerogative Court shall have authority to award

process for jurors, witnesses, parties and papers, and to compel appearance and obedience.

5. It shall be in the discretion of the Court to try causes pending therein, on depositions and examinations taken before a Master, or on the evidence of witnesses *ore tenus* at the bar of the said Court.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

1. The Prerogative Court shall have full power and authority, on the petition of any surety, or sureties of any administrator or guardian, or on the petition of any co-executor, co-administrator, or co-guardian, or on the petition of any other proper person, to take order for the relief of such surety, or other petitioner, or other person; and therein to make decree, according to the truth and equity of the case, against any executor, administrator, or guardian, separately; and the same decree to enforce by *ne exeat*, attachment, or execution, against goods and lands, or all of them, in legal discretion.

2. The recognizance to be taken by virtue of this act, may by permission of the Ordinary, be prosecuted in the Prerogative Court by *Scire Facias*. And upon the return *Scire Feci* on one writ of *Scire Facias*, or upon the return *Nihil* on two writs of *Scire Facias*, judgment shall be entered with costs; unless the defendants mentioned in the said writ or writs, or some, or one of them, shall make affidavit of merits; and on such affidavit, shall obtain leave to plead; and then, and in that case, the defence shall be confined to the matters so sworn to, or affirmed; unless the Court for just cause, or on reasonable terms, shall permit other matters to be pleaded.

3. The bonds to be made and given by virtue of, and in compliance with this act, may by permission of the Ordinary, be prosecuted in the Prerogative Court, to judgment.

4. After judgment shall have been entered on any writ of *Scire Facias*, on forfeited recognizance, either by default or on trial; or after judgment shall have been entered on any bond, as provided for in this act; the Prerogative Court may and shall, from time to time, assess the damages which any petitioner whatsoever may have sustained by reason of any neglect, delinquency, unfaithfulness, or insolvency of any such recognizor, or obligor, as the case may be; and award and is-

sue execution thereon, with costs, to and for the use, interest and benefit of such aggrieved petitioner, his, her, or their executors, or administrators; and therein cause right and justice to be done: Provided, that the said damages so to be assessed, from time to time, as aforesaid, shall not in the whole, exceed the amount set forth in the said recognizance, or in the judgment on the said bond, as the case may be.

SEC. VIII. *And be it enacted by the authority aforesaid*, That—

1. Suits for the recovery of legacies in the Prerogative Court, shall be by petition and not by bill.

2. The first process therein shall be a summons, to be served according to law, as in other cases.

3. Constructive service of the summons may be adjudged, after reasonable publication under the order of the Court.

4. The answer of the defendant, or defendants, shall be on oath or affirmation, according to the rules of equity.

5. In default of answer, a decree *pro confesso* may be pronounced.

6. The defendant, or defendants, shall not plead or demur, to the petition, unless by special permission of the Court, and on probable cause shewn.

7. The final process to compel the payment, or delivery of legacies, or parts of legacies, decreed to be paid or delivered: or for the payment of surplus in distribution, may be served at the instance of the several parties to whom the same ought to be paid, or delivered; or united and joint, in the discretion of the Court.

8. The Court shall award, or withhold, costs on orders, sentences and decrees in equitable discretion.

SEC. IX. *And be it enacted by the authority aforesaid*, That—

1. When any executor, or administrator, who shall have received his letters from the Ordinary, shall discover, or believe that the personal estate of his testators, or intestate, is insufficient to pay his debts; and that the testator, or intestate, died seized of, or entitled unto, lands, tenements, hereditaments, or real estate, within this state, then it shall be the duty of such executor, or administrator, as soon as conveniently may be, to present to the Prerogative Court, a petition, under oath, or affirmation, setting forth a just and true account of the said per-

sonal estate and debts, so far as he can discover the same: together, also, with an account and description of the lands, tenements, hereditaments and real estate, whereof the said testator, or intestate, died seized, or entitled unto; together, also, with the names and ages of the devisees, if any, and of the heirs of the said testator, or intestate; and in the said petition praying the advice and aid of the said Court in the premises. Whereupon the said court shall make an order, directing all persons interested in such lands, tenements, hereditaments and real estate, to appear before the said Court, at a certain day and place, in the said order to be mentioned, to shew cause why so much of the said lands, tenements, hereditaments and real estate, whereof the testator, or intestate, died seized or entitled unto, should not be sold, as may be sufficient to pay his debts, or the residue thereof, as the case may require, which aforesaid order shall be published in such manner, and for such time as the Court shall direct.

2. At the time and place mentioned in said order, or at such other subsequent time and place as the Court shall appoint, the said Court shall proceed to hear and examine the proofs and allegations of the said executors, or administrators, and of all other persons therein interested; and if, on full examination, the Court shall find, that the personal estate of the testator, or intestate, is not sufficient to pay his debts, the said Court shall require the said executor, or administrator, as the case may be, to become bound to this state, with at least one sufficient freehold surety, by recognizance, in such sum as the Court shall direct and appoint, not being less than twice the value of lands, tenements, hereditaments and real estate intended or required, to be sold for the payment of debts; upon condition, that if the said executor, or administrator, shall faithfully and fairly sell the said lands, tenements, hereditaments, and real estate; and faithfully and fairly apply the just proceeds of the said sales in a course of administration; and shall faithfully and fairly distribute the surplus, after the payment of debts, if any there shall be, according to law, then the said recognizance shall become void, otherwise of effect.

3. And then, after the said recognizance, shall have been entered into, as aforesaid, and not before, the said Court shall or-

der, adjudge, and decree, that the said executor, or administrator as the case may be, shall make sale of the whole of the lands, tenements, hereditaments, and real estate, whereof the testator, or intestate, died seized, or entitled unto, or so much thereof, as will be sufficient to pay his debts, or the residue thereof, as the case may be. And when a part only of the said lands, tenements, hereditaments and real estate, is sufficient, then such order shall specify the part to be sold: Provided, always, that where any houses and lots, or lands, are so circumstanced, that a *part* thereof cannot be sold without manifest prejudice to the heirs, or devisees, the said Court may, at discretion, order and decree the whole to be sold, or a greater part than is necessary for the payment of debts: and the surplus money arising from such sales, shall be distributed and divided among the heirs, or devisees, according to the rule of descents, in the former, and the will of the testator, in the latter case.

4. The Prerogative Court shall have power and authority, and it shall be the duty of the said Court, to take order in relief of the heir, or devisee, whose lands, tenements, hereditaments, or real estate, so descended, or devised, shall have been sold, as aforesaid, for the debts of his ancestor, or devisor; and therein, and thereby, decree and compel all others claiming, or holding under such ancestor, or devisor, to contribute in just proportion to their respective interests, so as to equalize the burden, or loss, according to Equity.

5. The executor, or administrator, who may be ordered by the Prerogative Court, to sell any lands, tenements, hereditaments, or real estate, whereof any testator, or intestate, died seized, or entitled unto, shall give such public notice of the time and place, as the Prerogative Court shall direct:

6. And shall sell the said lands, tenements, hereditaments, and real estate, agreeably to the order of the said Court, at public vendue and outcry, for the most, and best price which he can get for the same:

7. And shall make a deed of conveyance, and assurance of the said lands, tenements, hereditaments, and real estate, to the purchasers thereof:

8. And the said decree, sale and deed, shall vest in the purchaser as good and perfect an estate in the premises therein

mentioned as the heirs, or devisees of the said ancestor, or devisor, were seized of, or entitled unto, at the time of making such decree of the Prerogative Court:

9. And the dower of the widow, of such ancestor, or devisor, in and to the same premises, shall be thereby barred, and forever discharged:

10. And in lieu of the said dower, one equal third part of the purchase money, aforesaid, shall, under the order of the Court, be put to annual interest, for the use of such widow, entitled to dower, as aforesaid; and the said annual interest, shall be paid to such widow yearly, and every year, during her natural life; and after her death, the said principal sum so put to interest, shall descend, or be divided, as real estate, to, and among the heirs, or devisees, according to the rule of descents in the former, and the will of the testator, in the latter case.

11. And the dower of the widow of the said heir, or devisee, of, in and to the said premises, so sold, as aforesaid, for the payment of debts, shall be utterly and forever discharged and barred.

12. And the moneys arising from such sale of the lands, tenements, hereditaments and real estate, whereof the said testator, or intestate, died seized, or entitled unto, shall be received by the said executor, or administrator, and shall be considered as assets in his hands.

13. And the surplus, if any, after payment of debts, shall be distributed among the heirs, or devisees, according to the law of descents, in the former, and the will of the testator, in the latter case.

14. And the said executor, or administrator, as the case may be, shall make report in writing, of all his doings in the premises, according to the rules of the Prerogative Court.

Sec. X. *And be it enacted by the authority aforesaid*, That—

1. In every case wherein an order hath been made, or shall hereafter be made, by any Court in this state, having lawful authority to make such order, and in which order the said Court hath ordered or directed two, or more, co-executors, or co-administrators, to sell the whole, or any part of the lands, tenements, hereditaments, and real estate, whereof any testator, or intestate, died seized or entitled unto, any one or more

of the said co-executors, or co-administrators, shall, or may have departed this life before such sale shall have been made, or before a deed, or deeds of conveyance may have been executed in pursuance thereof, that then and in that case, the survivors and survivor of such co-executor, or co-administrator, as the case may be, shall be, and hereby are, authorized and empowered, to sell the said lands, tenements, hereditaments and real estate :

2. And to make good and sufficient deed, or deeds of conveyance for the same, to the purchaser or purchasers :

3. And in all respects to execute, carry into effect and fulfil the said order, as fully and effectually, to all intents and purposes, as all the executors, or administrators, named in the said order, might if living, execute and fulfil the same.

SEC. XI. *And be it enacted by the authority aforesaid*, That—

1. In every case wherein an order hath been, or shall be made, by any Court in this state, having lawful power to make such order, in which order the said Court hath ordered, or directed, or shall order, or direct, two or more co-guardians, to sell, mortgage, or lease, the whole, or any part of the lands, tenements, hereditaments, or real estate of any ward, for the proper education, maintenance, or support of such ward, and one or more of the said co-guardians, shall, or may have departed this life before such sale, mortgage, or lease shall have been made, or before a proper deed, or deeds, shall have been executed in pursuance thereof ; then, and in every such case, the survivors and survivor of such co-guardian, shall be, and they are hereby authorized and empowered, to sell, mortgage, or lease the said lands, tenements, hereditaments and real estate, according as the order of the said court shall have directed.

2. And to make and execute good and sufficient deeds for the same, according to the nature of the case :

3. And in all respects to execute, carry into effect, and fulfil the said order, as fully and effectually, to all intents and purposes, as all the guardians named in the said order might, if living, execute and fulfil the same.

SEC. XII. *And be it enacted by the authority aforesaid*, That—

1. In all cases of lands, tenements, hereditaments and real estate, held or to be held, by co-parceners, joint-tenants or

tenants in common, the Prerogative Court shall have full power and authority, to cause faithful and just partition to be made among the persons thereto entitled, in proportion to their respective rights therein, as fully and effectually, as the Court of Chancery might, or could do.

2. The proceedings to effect such partition shall be by petition and not by bill.

3. The partition shall be made by a Master, or by Commissioners, or otherwise, in the discretion of the Court.

4. The partition shall be in just judgement and assignment, and not by lot.

5. The costs, charges and expenses of the said proceedings, shall be fairly and equitably assessed unto, and among the several and respective owners of the said lands, tenements, hereditaments and real estate, in proportion to their respective interests therein.

6. The assessment of the costs, charges, and expenses shall be a lien on the said lands, tenements, hereditaments and real estate, so partitioned, as aforesaid, severally and not jointly.

7. The share and portions of the same, assigned and set apart, to each of the several owners, being subject, as aforesaid, to the separate, but not joint lien, for its proportion of the costs, charges and expenses, may in default of payment, and by order of the Court, be taken and sold by writ of *venditioni exponas*, to be issued out of the said Court, to satisfy the said lien.

8. Where a lien by contract, operation of law, or otherwise, shall be on the undivided interest, or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge and lien only on the share assigned to such party, and such share shall be first charged with its just proportion of the costs, charges and expenses of the proceedings in partition, in preference to any other lien.

Sec. XIII. *And be it enacted by the authority aforesaid,* That—

1. If it shall appear that the said lands, tenements, hereditaments and real estate, cannot be partitioned without manifest prejudice, or detriment to the interest of the owners thereof; or, if it shall appear, that it is to the interest of the parties concerned, that the said lands, tenements, hereditaments and real estate, be *sold*, rather than *partitioned*; then, in that case,

it shall be lawful for the Prerogative Court to decree that the said lands, tenements, hereditaments and real estate, be sold by one of the Masters of the Court, and the proceeds of the said sales to be divided unto, and among the parties interested in the said lands, tenements, hereditaments and real estate, their guardians, or legal representatives, in proportion to their respective rights in the same, deducting from their respective shares, the costs, charges and expenses which may have been assessed upon the same, and which shall and may be allowed and ordered to be retained out of the proceeds of the said sales.

2. All sales and conveyances of lands, tenements and hereditaments, in virtue of any decree, or order of the Prerogative Court, after being confirmed by the said Court, shall be good and available in law.

3. The estate, right and interest of every *feme covert* in the money, or moneys, arising from such sale, shall be protected by the said Court by investment, or otherwise, according to equity; unless the said *feme covert* being above the age of twenty-one years, shall appear in open Court, and personally there before the Ordinary, assent to the said moneys being paid to her husband.

4. If any of the said parties shall be absent from this state, and without such legal representative, as aforesaid, or if being within this state, they shall by reason of infancy, or otherwise, be incapable of receiving their proportion of the said moneys; then the just proportion of the said moneys due to such party, shall be invested to his, her, or their own use, by order of the said Court, and under the control and direction of the same.

5. The said moneys, so as aforesaid arising, or to arise, from the sale of any lands, tenements, hereditaments and real estate so ordered to be sold, as aforesaid, shall be considered as real estate, and descendible as such, until the same shall have been actually received by the party entitled thereto, for his, or her own use and benefit.

6. The Prerogative Court may, in discretion require, all, or any one of the parties, before they shall receive any share of the moneys arising from such sale, to give security, to the satisfaction of the Court, to refund the said shares with interest thereon, in case it shall thereafter appear, that such party was not entitled thereto.

Sec. XIV. *And be it enacted by the authority aforesaid*, That—

1. The Prerogative Court shall have full power and authority in all cases, to hold plea and cognizance of dower; to decree the same when of right and by law it ought to be decreed: and to withhold and refuse the same, when the demandant is not thereto entitled.

2. Suits for dower in the said Court shall be by petition and not by bill:

3. The inquiry of damages in dower shall be by jury and not otherwise:

4. When the demandant shall, by decree, recover her dower, she shall also recover her costs to be taxed.

Sec. XV. *And be it enacted by the authority aforesaid*, That—

1. The Prerogative Court may, from time to time, and as often as need be, make, alter, amend, or revoke, any rule of practice, so as to obviate doubts, advance justice, and expedite suits in the said Court, so that the same be not contrary to the provisions of this act.

REMARKS UPON THE BILL

Entitled "An Act concerning the Ordinary and the Prerogative Court"

Section 1. The Constitution of this state having made the Governor the Ordinary, it follows, that this section is chiefly declaratory. It is not known, that any one of the authorities and powers mentioned in this section, does not belong strictly to the office of the Ordinary.

The subdivisions and classification, are esteemed a matter of convenience.

The probate is in the nature of a judicial record, and the letters testamentary, or other letters, which are in truth commissions, or writs, ought to issue from the fountain of authority—the state.

By the Act Nov. 9, 1803, the probate as such, was to be dispensed with. Letters testamentary, or of administration, were no longer to be issued; but a *certificate of appointment*, was to stand in the place of both, and to supply both.

It is exceedingly puzzling to answer the questions of jurists from other states, when they enquire, where are the original letters testamentary, or of administration? And we encounter no small difficulty to make them understand, that by our law, a certificate that a certain man *had been appointed*, is, in itself, a commission to that very man. In one case, indeed, the Chancellor of New-York, went so far, as to refuse the Surrogate's certificate, in evidence, saying at the time, that that certificate, bore on its face, that there was a commission behind, as the basis of the certificate, and as being the best, and surest evidence, it ought to have been produced.

Sec. II. Heretofore the bonds of administrators and guardians, have been taken in the name of the Ordinary, as obligee. It had been done so in England, and the precedent has been followed here, for more than half a century after the reason of the thing had entirely ceased. Almost all the states in the union have adopted the alteration.

7. Of this section, introduces an important alteration. When the bond of an administrator has become forfeited, and it is necessary to bring suit upon it, we know, from sad experience, how difficult it is to recover any thing in relief, even of creditors: And, with respect to the afflicted and bereaved widow and children, I am sorry to add, that their case, in general, is almost hopeless.

The fraudulent and unfaithful administrator, generally, has so disposed of his estate, before the suit has advanced to maturity, that the execution has little or nothing to reach.

The sureties on the bond, too frequently feel themselves under no moral obligation to pay, perhaps, a large sum of money for that, which has been, to them, no benefit; but on the contrary, a vexation: and through a thousand evasions and subterfuges, helpless widows and orphans are robbed of their substance, through the forms of law.

I know that it is no easy matter to protect and enforce the rights of infants. Excellent, sagacious and learned judges, have expressed their deep regret at this want of power.—Lord Thurlow, than whose, a more vigorous mind never adorned the hall of justice, and of whom, the graphic description was, "his head is crystal, and his heart is steel."—Thurlow *lamented*, (even Thurlow could lament) his inability to protect and de-

fend those who "could not come before him, raise their little hands, and ask protection." The story of *their wrongs*, is a reproach to jurisprudence.

These remarks, it will be seen, apply with equal force to executors, who, as a general rule, are not required to give security; and they apply in a degree to guardians.* This number, 7, proposes, that executors, administrators and guardians, shall enter into recognizance to the state, with condition for the faithful performance of duty, and creates a lien on the real estate of the executor, administrator and guardian, until the same is discharged by decree.

8 and 9. Necessarily emanate out of 7.

10. Requires no comment.

Sec. III. Is divided into 12 numbers, all of which, seem essential to the proper exercise of the duties of a Prerogative Court.

Sec. IV. Relates to the officers of the Court.

It has long been a *desideratum* there, to have Masters, as in the Court of Chancery.

Sec. V. 1. It is believed, that notices and publications ought to be, as the Court shall direct, in each case, rather than by statute rule. What is much more than sufficient, in some cases, is perfectly inoperative in others.

2. Is in conformity with the existing law, in like cases.

3, 4, 5 and 6. Require no comment.

7. The trial before auditors, as it is frequently directed by the Orphans' Court, is burthensome, expensive and dilatory. It is supposed that a reference to a Master, as it is done in Chancery, will attain the object more certainly, and with less expense of time and money.

8. Is a necessary consequence of the foregoing.

Sec. VI. Great inconveniences have arisen, from sending issues from one Court into another independent Court for trial. This is proposed to be remedied, by authorizing the Prerogative Court to try issues by jury.

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* I intended to suggest to the Legislature the propriety of requiring security from executors, as fully and effectually, as it is by law required from administrators and guardians. I had prepared a Section to that effect; but on conversation with some very discreet and intelligent friends, I found them, one and all, decidedly opposed to it, and I was induced to yield; but, I confess, I am not convinced. I feel it due to them, and to myself, to make this note.

Sec VII. 1. The power here given to the Court, and the duty imposed upon it, seems to be essential to the relief of co-executors, co-administrators and sureties. The justice of the measure, must be apparent. The phrases in a statute, *order*, *make order*, *take order*, when applied to a judicial tribunal, imply a previous notice or summons.

2. This is according to the long established mode of prosecution on a recognizance.

3 and 4. This is much more convenient, than to send the bond into the Supreme Court for prosecution and assessment.

Sec. VIII. This section relates to suits for the recovery of legacies. That a Court of common law, cannot, from its nature and construction, marshal assets, and ascertain the abatement of legacies in part, is conceded by all, who have given to this subject any reasonable attention.

The manner of proceeding prescribed in this, is as simple as it is possible to be.

Sec. IX. 1. Is taken from the 19th section of the act making lands liable to be sold for the payment of debts, passed 18th February 1799, with such slight alterations, as merely to adapt it to the Prerogative Court.

2. The additional security required here, it is believed, is a valuable improvement.

I need make no remarks upon the remaining numbers of this Section: Though important, they address themselves to the plain principles of justice and propriety.

Sec. X. Is, in all its parts, conformable to the existing law.

Sec. XI. Is, in like manner, in general, extracted from our Statute. The principle enacted by the Legislature and set forth in this, and the preceding Section, is in conformity with the Statute of our sister States, with, I believe, but four exceptions.

Sec. XII. That the Prerogative Court must have jurisdiction of partition in some cases, is very evident. Why that cognizance should be confined to the cases of lands lying in different counties, is not so easily understood. The proceedings in this Court must be simple, and more expeditious than in Chancery.

Sec. XIII. The provisions in this section, seem necessary to be inserted, to enable the Court to exert its authority equitably, and for the protection of the rights of parties.

Sec. XIV. Gives to the Court cognizance of dower, and requires no comment.

Sec. XV. And the last. In this section a very necessary power is given to the Court. It is almost impossible that the Statute can make rules of practice, which shall be universal in their operation.

AN ACT

Respecting the Orphans' Court.

Section 1. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. The Chief Justice or one of the Justices of the Supreme Court, shall hold a Court of record in every county of this state, to be called the Orphans' Court.

2. There shall be four regular terms of the said Court annually in every county, commencing at the times and places appointed by law, or to be appointed by law, for holding the regular terms of the Inferior Court of Common Pleas.

3. The said Court may be held and continued each term thereof, for so many days as the business of, and before such Court, shall render necessary or convenient.

Sec. II. *And be it enacted, by the authority aforesaid,* That—

1. The Orphans' Court of the several and respective counties of this state, shall have full power and authority, to hold and exercise appellate jurisdiction and cognizance on, and over all acts, deeds, sentences, orders and decrees whatsoever, of the Surrogates of their respective counties, and therein shall and may affirm, ratify, alter, change, suspend, repeal, revoke, or annul the probates of wills, testaments and codicils, and the letters testamentary issued thereon in part or in whole: And also all letters of administration granted by the Surrogate in part or in whole: And also all letters af guardianship, granted by the Surrogate in part or in whole.

2. The said appeal shall be by petition and rule thereon in the Orphans' Court: and thereupon the Surrogate shall, according to the command in the said rule, and on such terms as the Orphans' Court shall direct, return to the said Orphans' Court all the proceedings before him had in respect of the matters in controversy.

3. And the said appeal whether it be on collateral, interlocutory or definitive matter shall remove the whole cause; and the Orphans' Court shall then proceed as of original jurisdiction.

SEC. III. *And be it enacted by the authority aforesaid*, That—

1. The Orphans' Court shall have full power and authority, in discretion and on reasonable grounds, to require from executors, administrators and guardians, receiving their letters from the Surrogate of the same county, separately or jointly, according to the nature of the case, security or additional security as the case may be, for the performance and execution of their several and respective offices, duties and trusts.

2. And may by order and decree, prescribe the nature and extent of the said securities or additional securities so required as aforesaid: And whether the same shall be by bond, recognizance or otherwise.

3. And in failure of compliance with the said order and decree, the Orphans' Court may revoke, suspend, repeal or annul all letters testamentary, letters of administration or letters of guardianship, so far forth as respects the executors, administrators or guardians respectively, so failing to comply with the said order or decree.

SEC. IV. *And be it enacted by the authority aforesaid*, That—

1. The Orphans' Court so constituted, shall have full power and authority, as well in original jurisdiction, as in appeal from the Surrogate, and in concurrence with the power, jurisdiction and authority of the Ordinary, to take the proof of last wills, testaments and codicils, of all deceased persons, who at, or immediately previous to their death, shall have been inhabitants of the respective counties of such Courts, in whatever place the death of such person may have happened; and to make, adjudge and record probate on the same:

2. And to grant letters testamentary according to law:

3. And to grant letters of administration of the goods and

chattels, rights and credits, at the time of their death, of all such persons dying intestate :

4. Or with the will annexed, when the same shall be requisite :

5. And to grant letters of guardianship, of the persons and estates of orphan children, within the bounds of their respective counties and jurisdictions, and in all other proper cases within the same bounds.

6. Such letters testamentary, letters of administration and letters of guardianship, shall severally be in the nature of commissions, and shall be made in the name of this state and tested in the name of the Judge of the Orphans' Court, from whence the said letters shall come, or be granted, and shall be sealed with the seal of the said Orphans' Court.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. The Orphans' Courts shall have power and authority to cause to come before them respectively, or before any officer or minister thereof, to be appointed for that purpose, all such executors, administrators and guardians, as shall receive, or shall have received their letters from the Surrogate, or from the Orphans' Court of the same county, and them or any, or all of them, to compel to account :

2. And to hear and determine all controversies therein, touching and concerning the truth, fullness and fairness of inventories :

3. To require and compel the production and exhibition, by any executor, or other person within their respective jurisdictions, of any last will, testament or codicil, or other paper in the nature of a last will, testament or codicil, in his possession or under his control being ; to the end, that the same may be enquired into, examined and proved according to right :

4. To correct and amend all mistakes and errors in the accounts of such executors, administrators and guardians, and to decree the settlement and allowance of the said accounts, when amended and corrected according to law :

5. To compel all such executors and administrators, faithfully to administer the estates committed to them, and to pay the debts of their testators and intestates, so far as they shall have assets for the same :

6. To decree the payment or delivery of legacies, or the abatement of the same, in whole or in part, and to order and de-

cree payment or delivery of the part not abated, with interest and costs, where interest and costs ought to be allowed, in all cases within their several and respective jurisdictions as aforesaid :

7. To decree and order distribution of surplus estate, after payment of debts in like circumstances :

8. To compel all such guardians to account from time to time, and as often as need be, with their respective wards, and to pay as the Court shall direct, or to invest under the order of the Court, all balances that shall on account be found justly due:

9. To take order for the relief of all such wards, touching their persons and estates, against delinquent, negligent, unfaithful or insolvent guardians :

10. To authorize and empower such guardians, when on due examination it doth or shall appear, that the personal estates of their wards, together with the yearly income of their real estate, are insufficient for the proper education, maintenance and support of such wards, to sell, mortgage or lease the real estates of such wards, or any part thereof, in the discretion of said Court :

11. To remove from office by order and decree, and supersedeas thereon, if need, be on just cause and on reasonable terms, delinquent, defaulting, negligent, unfaithful or insolvent executors, administrators or guardians within their respective jurisdictions, and in their discretion to appoint other administrators and guardians if need be in their stead :

12. And to compel obedience to the decrees and orders of the said Court by attachment, injunction, *ne exeat*, execution against body, execution against goods and lands, or all of them, or by other proper remedial writ, from time to time to be devised by the said Court in legal discretion.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. The Surrogate of the county shall be the Register of the Orphans' Court of the county, and shall attend the sittings of the said Court at the stated terms thereof, shall register and enrol the decrees and other proceedings of the said Court proper to be enrolled ; and shall do such other acts as by law and the practice of the Court shall be required of him.

2. A Register *pro tempore* for all such stated and regular terms, as well as special ones, in which the Surrogate shall not attend, may be appointed by the Court.

3. The Orphans' Court shall appoint and commission six Masters of the Court, of whom the Surrogate shall *ex officio* be one. And the said appointment of the five Masters, exclusive of the Surrogate, the Orphans' Court may revoke at pleasure, and appoint and commission others in their places.

4. It shall be the duty of the said Masters, and they and each of them, shall have full power and authority to take in writing, on oath or affirmation, the examinations of all parties, witnesses or other persons required or permitted to testify, or to be examined before the Orphans' Court, or any one of its officers: and the said Masters shall also do and perform all such other acts and things, as by law or the practice, or rule of said Court shall be required of them respectively: and they shall be allowed a compensation for their services, in the discretion of the Court.

5. The sheriff, coroners, constables and such elisors as shall be appointed from time to time, shall be, and hereby are declared to be the ministerial officers of the said Court, and shall execute the writs, precepts and process issuing out of the said Court, and to them respectively directed and delivered.

6. The Governor of this state, shall cause to be procured at the expense of the state, a proper seal, with a suitable impression and device for each of the said Courts respectively.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

1. Proper and convenient time shall be given, in and by the rules and orders of the said Court, to file exceptions, and contest the accounts of executors, administrators and guardians, as well in the inventory and appraisement, as in the charge and discharge thereof; whether the said accounts be presented after citation, monition or process for that purpose, or voluntarily.

2. All executors and administrators, after the expiration of twelve months from the time of issuing their respective letters, may be required to render account.

3. And for this purpose, any creditor, legatee, next of kin, devisee, heir, or other proper person, may petition for monition, citation or other proper process, to answer and account, and the same shall be accorded.

4. Obedience to the said process of the Court, may be compelled by fine, imprisonment and distress infinite.

5. On service of the citation, monition or other process according to law, and the same being returned, and certified to the Court, the executor, administrator or guardian, or other person required to account, may be considered as in Court, and may be proceeded against forthwith, according to law, and the rules of the Court.

6. If any executor, administrator or guardian receiving his letters from the Surrogate, or from the Orphans' Court, shall avoid or evade the service of process to answer and account, or shall reside out of this state, so that he cannot be served with process, then it shall be lawful for the Court, by rule to direct reasonable publication, and to adjudge the same, constructive service of the process, and thereupon to proceed against the said executor, administrator or guardian, as being in Court.

7. Exceptions may be taken and filed against the accounts of executors, administrators or guardians, exhibited in the Orphans' Court within such time as the Court shall by rule direct. And the same may be enquired into, examined and decided by the Orphans' Court, or the said accounts and exceptions may by rule of the said Court be referred to a Master to report thereon, to the end that the said Court may decree in the premises according to equity and good conscience.

8. The Orphans' Court shall have full power to cause to come before it, or before any Master, or other officer of the said court, all parties and witnesses, and them or any of them, to examine or cause to be examined, on oath or affirmation, touching or concerning any matter or thing, in the said accounts, or exceptions, specified or set forth, or otherwise there in controversy : and if any party, witness or other person, shall on such examination swear or affirm falsely and corruptly, such party, witness or other person, shall be deemed guilty of wilful and corrupt perjury, and on conviction shall be punished as such.

Sec. VIII. *And be it enacted by the authority aforesaid*, That—

1. When any executor, or administrator, who shall have received his letters from the Surrogate or Orphans' Court, shall discover, or believe that the personal estate of his testator, or intestate, is insufficient to pay his debts ; and that the testator, or intestate, died seized of, or entitled unto, lands, tenements,

hereditaments, or real estate, within this state, then it shall be the duty of such executor, or administrator, as soon as conveniently may be, to present to the Orphans' Court of the county in which the said lands, tenements, hereditaments and real estate are situate, a petition, under oath, or affirmation, setting forth a just and true account of the said personal estate and debts, so far as he can discover the same; together also, with an account and description of the lands, tenements, hereditaments, or real estate, whereof the said testator, or intestate, died seized or entitled unto, wheresoever in this state the same lands, tenements, hereditaments, or real estate may lie, or be situate; together, also, with the names and ages of the devisees, if any, and the heirs of the said testator, or intestate; and the said petition praying the advice and aid of the said Court in the premises. Whereupon the said Court shall make an order, directing all persons interested in such lands, tenements, hereditaments and real estate, to appear before the said Court, at a certain day and place, in the said order to be mentioned, to shew cause why so much of the said lands, tenements, hereditaments and real estate, whereof the testator, or intestate, died seized or entitled unto, situate in the same county, should not be sold, as may be sufficient to pay his debts, or the residue thereof, as the case may require, which aforesaid order shall be published in such manner, and for such time as the Court shall direct.

2. At the time and place mentioned in said order, or at such other subsequent time and place, as the Court shall appoint, the said Court shall proceed to hear and examine the proofs and allegations of the said executors, or administrators, and of all other persons therein interested; and if, on full examination, the Court shall find, that the personal estate of the testator, or intestate, is not sufficient to pay his debts, the said Court shall require the said executor, or administrator, as the case may be, to become bound to this state, with at least one sufficient freehold surety, by recognizance, in such sum as the Court shall direct and appoint, not being less than twice the value of the lands, tenements, hereditaments and real estate intended, or required, to be sold for the payment of debts; upon condition that if the said executor, or administrator, shall faithfully and fairly sell the said lands, tenements, hereditaments, and real estate; and faithfully and fairly apply the just proceeds of the

said sales in a course of administration; and shall faithfully and fairly distribute the surplus, after the payment of debts, if any there shall be, according to law, then the said recognizance shall become void, otherwise of effect.

3. And then, after the said recognizance shall have been entered into, as aforesaid, and not before, the said Court shall order, adjudge, and decree, that the said executor, or administrator, as the case may be, shall make sale of the whole of the lands, tenements, hereditaments, and real estate, whereof the testator, or intestate, died seized, or entitled unto, situate in the said county, or so much thereof, as will be sufficient to pay his debts, or the residue thereof, as the case may be. And when a part only of the said lands, tenements, hereditaments and real estate, is sufficient, then such order shall specify the part to be sold: Provided, always, that where any houses and lots, or lands, are so circumstanced that a *part* thereof cannot be sold without manifest prejudice to the heirs, or devisees, the said Court, may at discretion, order and decree the whole to be sold, or a greater part than is necessary for the payment of debts: and the surplus money arising from such sales, shall be distributed and divided among the heirs, or devisees, according to the rule of descents, in the former, and the will of the testator, in the latter case.

4. And thereupon, it shall be the duty of the Prerogative Court of this state, and the same Court shall have power and authority in all proper cases, to take order in relief of the heir, or devisee, whose lands, tenements, hereditaments, or real estate, so descended, or devised, shall have been sold, as aforesaid, for the debts of his ancestor, or devisor; and therein, and thereby, decree and compel all others claiming, or holding under such ancestor, or devisor, to contribute in just proportion to their respective interests so as to equalize the burden, or loss, according to Equity.

5. The executor, or administrator, who may be ordered by the Orphans' Court, to sell any lands, tenements, hereditaments, or real estate, whereof any testator, or intestate, died seized, or entitled unto, shall give public notice of the time and place, as the said Court shall direct:

6. And shall sell the said lands, tenements, hereditaments, and real estate, agreeably to the order of the said Court, at

public vendue and outcry, for the most and best price which he can get for the same :

7. And shall make a deed of conveyance, and assurance of the said lands, tenements, hereditaments, and real estate, to the purchasers thereof :

8. And the said decree, sale and deed, shall vest in the purchaser as good and perfect an estate in the premises therein mentioned, as the heirs, or devisees of the said ancestor, or devisor, were seized of, or entitled unto, at the time of the making such decree of the Orphans' Court :

9. And the dower of the widow, of such ancestor, or devisor, in and to the same premises, shall be thereby barred, and forever discharged :

10. And in lieu of the said dower, one equal third part of the purchase money, aforesaid, shall, under the order of the Court be put to annual interest, for the use of such widow, entitled to dower, as aforesaid ; and the said annual interest, shall be paid to such widow yearly, and every year, during her natural life ; and after her death, the said principal sum so put to interest, shall descend, or be divided, as real estate, to, and among the heirs, or devisees, according to the rule of descents in the former, and the will of the testator, in the latter case.

11. And the dower of the widow of the said heir, or devisee, of, in and to the said premises, so sold, as aforesaid, for the payment of debts, shall be utterly and forever discharged and barred.

12. And the moneys arising from such sale of the lands, tenements, hereditaments and real estate, whereof the said testator or intestate, died seized, or entitled unto, shall be received by the said executor, or administrator, and shall be considered as assets in his hands.

13. And the surplus, if any, after payment of debts, shall be distributed among the heirs, or devisees, according to the law of descents, in the former, and the will of the testator, in the latter case.

14. And the said executor, or administrator, as the case may be, shall make report in writing, of all his doings in the premises, according to the rules of the Orphans' Court.

SEC. IX. *And be it enacted by the authority aforesaid*, That—

1. The Prerogative Court of this State, the Orphans' Court of the proper county, and the Surrogates' Court of the proper county, shall be and they are hereby severally empowered and authorized, in respect of executors and administrators, who by law ought to account before them respectively, to order and direct by rule and on the application of such executors and administrators, that the creditors of the estates of the decedents respectively, bring in and exhibit to the said executors or administrators, their debts, demands and claims, against the same estates, within such reasonable time as the said Courts respectively, shall limit and appoint.

2. The said Courts respectively, shall have power and authority, in their discretion to require that the said debts, demands and claims, be verified by oath or affirmation.

3. The aforesaid rule, rules, or orders of the said Courts, shall be published in such manner, and for such length of time, as the aforesaid Courts respectively shall direct.

4. The executors or administrators, as the case may be, shall under oath or affirmation, make true report to said Courts respectively, of all claims, debts and demands, which shall be exhibited to them by virtue of, and in obedience to the order of the Court

5. If any creditor shall refuse, or neglect to exhibit his debt, demand or claim, verified as aforesaid, within the time so limited, such creditor shall be forever barred of his action therefor, against such executors or administrators : unless the Court on just cause, and on reasonable terms, shall allow further time for the exhibition of such debt, demand or claim.

6. After the report aforesaid, and after due publication thereof, if publication shall be deemed necessary, and after the expiration of such further time as shall be allowed as aforesaid, for the exhibition of any or all of the debts, demands, or claims of creditors; the Court shall make a decree, forever barring all such creditors of the said decedent as shall not have exhibited their debts, claims and demands as aforesaid, from having or maintaining any action therefor, against such executors or administrators, as the case may be.

7. Any creditor who shall have been barred of his action as aforesaid, may nevertheless, according to equity, and on equita-

ble terms, have relief for the same debt, demand or claim, by the decree of the Prerogative Court, or by the decree of the Orphans Court of the proper county, as the case may be, against the heirs, devisees, legatees, next of kin, or other persons having received portion, or being entitled to receive portion or distributive share of the surplus estate of the testator or intestate :— But he shall not recover costs therewith.

8. If any creditor, who shall have any *lien* on any lands, tenements, goods, chattels, or effects, for the payment of any debt, demand or claim; or to whom any lands, tenements, goods, chattels or effects, shall have been specifically pledged, for the payment of any debt, demand or claim, shall by reason of his neglect, or refusal to exhibit his said debt, demand or claim as aforesaid, be barred of his action therefor, against the executors or administrators; nothing in this act contained, shall be so construed, as to prevent such creditor from prosecuting for, and recovering the said lands, tenements, goods, chattels or effects, on which he may, or shall have such lien as aforesaid; or the said lands, tenements, goods, chattels or effects, so specifically pledged to him as aforesaid, in whose hands soever, or possession the same may be: but his rights thereto shall be and remain, as though this act had not been made.

Sec. X. *And be it enacted by the authority aforesaid*, That—

1. Whenever in the opinion of the Orphans' Court, it shall be necessary or proper, to have a trial by jury, the said Court shall have full power and authority, to form an issue or issues, for the trial of controverted matters of fact, and the same issue or issues to try at the bar of the Court, at such convenient time, and on such terms, as to the Court shall seem equitable and just.

2. The Orphans' Court shall have power to confirm the said verdict, and render judgment thereon, if need be: or for just cause, may set aside the said verdict, and a new trial grant, on equitable terms, and according to right.

3. The verdict of a jury so to be taken on any controverted facts, when confirmed and approved by the Court, shall be conclusive as to the facts therein found to be true by the said jury, so far only, as respects the parties and privies to the said issue.

4 For the purpose of carrying into effect the foregoing power, the Orphans' Court shall have authority, to award process for jurors, witnesses, parties and papers, and to award *tales de circumstantibus*, according to law, when necessary ; and to compel appearance and obedience.

5. It shall be in the discretion of the Court, to try causes pending therein, on depositions and examinations taken before a Master, or on the evidence of witnesses, *ore tenus* at the bar of the said Court, or both as the said Court shall direct.

Sec. XI. *And be it enacted by the authority aforesaid*, That—

1. The Orphans' Court shall have full power and authority, on the petition of any surety or sureties of any administrator or guardian, or on the petition of any co-executor, co-administrator, or co-guardian, in cases only, where the letters shall be granted, or shall have been granted by the Surrogate, or by the said Orphans' Court, to take order for the relief of such surety, or other petitioner, or other person, and therein to make decree, according to the truth and equity of the case, against any executor, administrator, or guardian separately, and the same decree to enforce by *ne exeat* attachment, or execution against body, execution against goods and lands, or all of them in legal discretion.

2. The recognizance to be taken by virtue of this act, may by permission of the Orphans' Court be prosecuted in the Orphans' Court by *scire facias*, and upon the return *scire feci* on one writ of *scire facias*, or upon the return *nihil* on two writs of *scire facias*, judgment shall be entered with costs, unless the defendants mentioned in the said writ or writs, or some one of them shall make affidavit of merits, and on such affidavit shall obtain leave to plead ; and that then, and in that case, the defence shall be confined to the matters so sworn to, or affirmed, unless the Court for just cause, and on reasonable terms, shall permit other matters to be pleaded.

3. The bonds to be made and given by virtue of, and in compliance with this act, may by permission of the Orphans' Court, be prosecuted in the Orphans' Court to judgment.

4. After judgment shall have been entered on any writ of *scire facias* on forfeited recognizance, either by default or on trial ; or after judgment shall have been entered on any bond,

as provided for in this act; the Orphans' Court may and shall, from time to time, assess the damages, which any petitioner whatsoever, may have sustained, by reason of any neglect, delinquency, unfaithfulness, or insolvency of any such recognizor, or obligor, as the case may be, and award and issue execution thereon with costs to, and for the use, interest and benefit of such aggrieved petitioner, his or her, or their executors, or administrators; and therein cause right and justice to be done: Provided that the said damages, so to be assessed from time to time as aforesaid, shall not, in the whole, exceed the amount set forth in the said recognizance, or in the judgment on the said bond, as the case may be.

Sec. XII. *And be it enacted by the authority aforesaid*, That—

1. Suits for the recovery of legacies in the Orphans' Court, shall be by petition and not by bill.

2. The first process therein shall be a summons, to be served according to law, as in other cases.

3. Constructive service of the summons may be adjudged, after reasonable publication under the order of the Court.

4. The answer of the defendant, or defendants, shall be on oath, or affirmation, according to the rules of equity.

5. In default of answer, a decree *pro confesso* may be pronounced.

6. The defendant, or defendants, shall not plead or demur, to the petition, unless by special permission of the Court, and on probable cause shewn.

7. The final process to compel the payment, or delivery of legacies, or parts of legacies, decreed to be paid or delivered; or for the payment of surplus in distribution, may be several at the instance of the several parties to whom the same ought to be paid, or delivered; or united and joint, in the discretion of the Court.

8. The Court shall award, or withhold, costs on orders, sentences and decrees in equitable discretion.

Sec. XIII. *And be it enacted by the authority aforesaid*, That—

1. In all cases of lands, tenements, hereditaments, and real estate, held or to be held by co-parceners, joint-tenants, or tenants in common, the Orphans' Court of the proper county, where the said lands shall lie, or be situate, shall have full

power and authority, to cause faithful and just partition to be made among the persons thereto entitled, in proportion to their respective rights therein, as fully and effectually, as the Court of Chancery might, or could do.

2. The proceedings to effect such partition shall be by petition and not by bill.

3. The partition shall be made by a Master, or by Commissioners, or otherwise, in the discretion of the Court.

4. The partition shall be in just judgment and assignment, and not by lot.

5. The costs, charges and expenses of the said proceedings, shall be fairly and equitably assessed unto, and among the several and respective owners of the said lands, tenements, hereditaments and real estate, in proportion to their respective interests therein.

6. The assessment of the costs, charges and expenses, shall be a lien on the said lands, tenements, hereditaments and real estate, so partitioned as aforesaid, severally, and not jointly.

7. The share and portion of the same, assigned and set apart to each of the several owners, being subject as aforesaid, to the separate, but not joint lien, for its proportion of the costs, charges and expenses, may in default of payment, and by order of the Court be taken and sold by writ of *venditioni exponas*, to be issued out of said Court, to satisfy the said lien.

8. Where a lien by contract, operation of law, or otherwise, shall be on the undivided interest, or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge and lien, only on the share assigned to such party, and such share shall be first charged with its just proportion of the costs, charges and expenses of the proceedings in partition, in preference to any other lien.

Sec. XIV. *And be it enacted by the authority aforesaid*, That—

1. If it shall appear that the said lands, tenements, hereditaments and real estate, cannot be partitioned, without manifest prejudice, or detriment to the interests of the owners thereof, or if it shall appear that it is to the interest of the parties concerned, that the said lands, tenements, hereditaments, and real estate be sold, rather than partitioned ; then, in that case, it shall be lawful for the Orphans' Court to decree, that the said lands, tenements hereditaments and real estate, be sold by one

of the Masters of the Court, and the proceeds of the said sales to be divided unto, and among the parties interested in the said lands, tenements, hereditaments and real estate, their guardians, or legal representatives, in proportion to their respective rights in the same, deducting from their respective shares the costs, charges and expenses, which may have been assessed upon the same, and which shall and may be allowed, and ordered to be retained out of the proceeds of the said sales.

2. The estate, right and interest of every *feme covert*, in the money, or moneys arising from such sale, shall be protected by the said Court, by investment, or otherwise, according to equity: unless the said *feme covert*, being above the age of twenty-one years, shall appear in open Court, and personally there, before the said Court, assent to the said moneys being paid to her husband.

3. If any of the said parties shall be absent from this state, and without such legal representative as aforesaid, or if being within this state, they shall, by reason of infancy, or otherwise, be incapable of receiving their proportion of the said moneys, then the just proportion of the said moneys due to such party, shall be invested to his, her, or their own use, by order of the said Court, and under the control and direction of the same.

4. The said moneys so as aforesaid arising, or to arise, from the sale of any lands, tenements, hereditaments and real estate, so ordered to be sold as aforesaid, shall be considered as real estate, and descendible as such, until the same shall have been actually received by the party entitled thereto, for his, or her own use and benefit.

5. The Orphans' Court may in discretion, require all, or any of the parties, before they shall receive any share of the moneys arising from such sale, to give security to the satisfaction of the Court, to refund the said shares with interest thereon, in case it shall thereafter appear, that such party was not entitled thereto.

Sec. XV. *And be it enacted by the authority aforesaid.* That—

1. The Orphans' Court shall have full power and authority in all cases, to hold plea and cognizance of dower, to decree the same, when of right and by law it ought to be decreed; and to withhold and refuse the same, when the demandant is not thereto entitled.

2. Suits for dower in the said Court shall be by petition and not by bill :

3. The inquiry of damages in dower shall be by jury and not otherwise :

4. When the demandant shall, by decree, recover her dower, she shall also recover her costs to be taxed, together with damages, when damages are by law allowed.

SEC. XVI. *And be it enacted by the authority aforesaid*, That—

1. The Chief Justice, or any other Justice of the Supreme Court, shall have full power and authority, at any other time and place, to hold a special Orphans' Court, for any county in this state, whether within the county, or without the same ; and then, and there to receive the petition of any party aggrieved, and then, and there to make, according to the equity and circumstances of the case, special orders in the prevention of waste, embezzlement, or fraud in any executor, or administrator, or in the prevention of any waste, embezzlement, fraud, cruelty, oppression, or mismanagement of any guardian, in respect to the person, or estate of the ward committed to him.

SEC. XVII. *And be it enacted by the authority aforesaid*, That—

From any sentence, order, judgment, or decree, to be made, rendered, or given in, or by any Orphans' Court of this state, whether the same be interlocutory, or collateral, definitive or final, any or either party thereby aggrieved, may appeal to the Prerogative Court of this state, and seek redress ; and the appeal shall be granted on the following terms, and in the circumstances following, and in no others :

1. Where the sentence, order, judgment, or decree shall be interlocutory, or collateral, the said appeal shall be taken and made, according to the rules of the Prerogative Court, within one year from the making and entering such sentence, order, judgment, or decree.

2. Where the sentence, order, judgment, or decree shall be definitive, or final, then, and in that case, the said appeal therefrom, shall be demanded and taken, within three years next after the making and recording, or enrolling, as the case may be, of such definitive, or final sentence, order, judgment, or decree.

3. The said appeal shall be by petition to the Prerogative Court, and by order thereon.

4. The narrative part of the petition of appeal, shall be verified by affidavit; or on failure thereof, the petition shall not be affiled in the Prerogative Court: unless the Ordinary, under special circumstances, shall allow the same to be affiled without verification.

5. The appellant shall make such reasonable deposite in the Registry of the Prerogative Court, to meet the costs, charges and expenses of the said appeal, as the Ordinary shall by rule direct.

6. The return of the Orphans' Court to the order of appeal, shall be full and without denial, and without delay.

7. The answer of the respondent may be required to be verified, as the Prerogative Court, under the circumstances of the case, shall think just and reasonable.

8. Contumacy for defect of answer to the appeal, shall not be adjudged, unless the rule, or order for answer, shall have been personally served.

9. It shall be in the discretion of the Ordinary, to allow additional evidence on the trial of the appeal, or to confine the parties to the evidence received in the Orphans' Court; according as it shall seem to be equitable and just.

10. Upon the trial of an appeal from the Orphans' Court, in the Prerogative Court, and full and final decree thereon, the same decree shall be executed by the process and order of the Prerogative Court, and shall not be remanded to the Orphans' Court.

SEC. XVIII. *And be it enacted by the authority aforesaid*, That—Whensoever, in the opinion of the Orphans' Court, their process confined to their respective counties, shall not be sufficient to effect full and ample relief, by reason that any accountant, executor, administrator, or guardian doth not, or shall not live within the said county; then, and in all such cases, the aid of the Prerogative Court shall be invoked in the premises; and it shall forthwith be accorded, and full and speedy justice shall be done, by means of process, to be issued out of the Prerogative Court.

SEC. XIX. *And be it enacted by the authority aforesaid*, That—In case any one, or more of several executors, or administrators, to whom letters testamentary, or letters of administration shall have been granted by the Ordinary of this state,

the Orphans' Court of the proper county, or the Surrogate of the proper county, shall die, become lunatic, convict of an infamous crime, or in any otherwise become incapable in law, of executing the trust reposed in him, or them ; or in case the letters testamentary, or letters of administration, shall be suspended, revoked, repealed, or annulled, according to law, with respect to any one, or more of the said executors, or administrators ; then, and in all such cases, the remaining executors, or administrators, shall proceed, and complete the execution of the will, or administration, as the case may be, according to law.

Sec. XX. *And be it enacted by the authority aforesaid*, That—

The Orphans' Court may from time to time, and as often as need be, make, alter, amend, or revoke any rule of practice, so as to obviate doubts, advance justice and expedite suits in the said Court, so that the same be not contrary to the provisions of this act.

REMARKS UPON THE BILL

Entitled "An Act respecting the Orphans' Court."

I cannot present this bill to the Legislature, even as their temporary reviser, without the deepest solicitude.

When I recollect the overwhelming interests, involved in the subject, the immense authorities granted from time to time to this tribunal ; the imbecility and helplessness of thousands, whose rights *must* be in question, and who cannot assert them : and the dread responsibility of those, to whom is entrusted the sacred charge of protecting and defending the widow, the orphan, and the absent : I find ample apology for my solicitude. But the assurance that the intelligent and high-minded Legislature of my native state, will examine this interesting subject, with scrutinizing and anxious care, is indeed a relief.

At the surrender of the Proprietary government to Queen Anne, in 1702, the *Royal* colony was established, and the general ecclesiastical jurisdiction of New-Jersey was reserved to the Lord Bishop of London. The commission and instruc-

tions to Lord Cornbury, the first royal governor, 16th November, and 5th December, of the same year, constituted him the Ordinary, and thereby vested in him the power of proving wills, and of granting letters testamentary, and of administration. This therefore, was done throughout the whole colony, by the Governor in person, or by his deputy. In the appointment of such, he was not limited by any rule or principle. The Surrogates were merely his deputies. He appointed as many, and as few as he pleased. There was no regard to counties, or other limits within the colony. But the jurisdiction of the Ordinary, in causes and in questions testamentary, of intestacy, and of guardianship, was original, supreme, and without appeal. *Sic volo, sic jubeo, stat pro ratione voluntas.*

Remote delegated power, tends to great abuses; and "these abuses full of their own wild native vigor, will grow and flourish under mere neglect."

Such was the fact, from the days of Cornbury, down to Franklin. Executors, administrators, and guardians, could not easily be called and coerced to account.

There were difficulties at every step, and most unfortunately they appeared greater than they really were. Few were willing to apply to the high Court of Chancery for its corrective; and great and enormous injustice was oftentimes submitted to, from the mere dread of the threatened expense and delay of a *wool-sack* decision.

Some few sickly efforts were made anterior to the revolution, to amend the system; but they proved abortive, or inefficient.

The Constitution of the revolution, declares the Governor to be the Ordinary.

Shortly after the revolution, 16th December 1784, the Legislature, thinking the evils of the old system to be intolerable, commenced legislation on the subject, and intended to apply a remedy that should be radical. By the act that day passed, they restrict the power of the Ordinary, and abridge it in many particulars.

I do not mean here to enter into any regular discussion of the constitutionality of the Orphans' Courts, as they were established by that act, altho' many of my brethren of the bar, have uniformly and steadily denied that they were constitutional. But it ought to be remembered, that the doctrine of *par-*

liamentary law was then yielded to in its fullest extent—that the *omnipotence of parliament* was the universally received principle of the day—that *legislation* and *supremacy* were esteemed convertible terms; and that the health-giving principle of paramount law, was brought into life and being, by the Constitution of the United States. Suffice it to say, that the act 16th December, 1784, was passed, and has been in operation, in this state, for nearly half a century: That it has repeatedly received the sanction of our Legislatures, and of our tribunals of justice; and that the question as to its constitutionality, is now no longer open.

From a careful review of the acts of the Legislature, which have since been passed on the subject, it is abundantly manifest; that the jurisdiction and authority of the Orphans' Court, have far, very far, transcended the limits, or expectations of those who were its parents, or sponsors. As it now exists, it enters into the tenures of things real and personal, and changes their ownership. Its cognizance is overwhelming, intimate, and perpetual. It has already become the general, and will shortly, according to the nature of things, be the universal source of our tenures in lands. It requires no extraordinary sagacity to perceive, that all real estates within this state, must come within the provisions of this extensive and absorbing jurisdiction. The time is fast approaching, when by the course and order of nature, the decree of the Orphans' Court, operating by sale or by partition, shall have overrun every farm and every house in New-Jersey.

I have not ventured in this Bill to abridge these powers, except in two instances. One of them is in the Act 13th Nov. 1804, in which it is enacted, that the Orphans' Court may specifically decree a sale of the lands of a testator, or intestate, where there is a written contract of the deceased to sell, and that is attested by two or more witnesses.

This act was so inartificially and clumsily drawn, and so one-sided in its aspect, that it has remained almost a dead letter in the Statute Book. The jurisdiction is given in the special case. The power to decree is accompanied with no powers of equity. No imposition of equitable terms is within the authority of the Court. The right to ask and have relief by specific performance, is denied to the children and representatives of

the deceased, and is given only to the survivor of the contracting parties. That all this is far, very far, from the power of decreeing the specific performance of a contract according to its true intent and meaning, must be obvious to every faithful inquirer. The latter is one of the most familiar and valuable subjects of jurisdiction in the high Court of Chancery. I have totally omitted this provision in the bill reported.

The other is in the Act passed Feb, 23d 1820, usually called the statute relating to assignment, in cases of insolvency. In this act there is a provision, that the accounts of the Assignees be settled in the Orphans' Courts.

The judicial authorities in this statute are of a strange, mixed and anomalous character, given partly to the Inferior Court of Common Pleas, and partly to the Orphans' Court. It is difficult to conceive how the accounts of a living insolvent, can be settled on the principles that govern the accounts of executors, administrators and guardians.

With regard to the two particulars above mentioned, the bill reported is entirely silent. On the other hand, it will be seen, that in relation to dower, partition, legacy, and distribution, the bill contemplates an extension of the jurisdiction of the Court. The first and second of these are now *sub modo*, and in particular cases cognizable in that tribunal. That suits for legacies are awkward affairs in *common law* Courts, is too evident to be denied; and I need not argue, that a right to decree and compel distribution, seems incident to the Court of account. Much litigation may be prevented, and great expenses saved.

To perform duties so various and important—to take care of interests so delicate, so diversified and so sacred, and to protect and defend that immensely numerous class of parties who cannot *make defence*, are all incumbent on the Judge of the Orphans' Court.

Intimate acquaintance with the civil, canon, ecclesiastical, and common law, is but a part of his qualifications. More, much more, must be added, to satisfy the claims of justice—a thorough knowledge of all the multiplied statute regulations—most familiar and easy recurrence to judicial decisions, and the reports of cases—a sound discriminating understanding—a "Herculean robustness of mind"—"nerves not to be broken by labor"—untiring diligence, and *instar omnium* the most un-

bending, uncompromising, and jealous integrity, and love of truth.

Jurisprudence is the noblest science that can task the intellectual energies of man. It is a science, and must be acquired. It is not thrown upon us by *descent*, but to use a phrase in legal language, it must be *purchased*, and the great *consideration* and *price* to be paid are, severe study, labor, patience, time.

I hope I shall not be misunderstood on this point; nor that I shall be esteemed the advocate for the *mere leaden diploma*. Too often does it occur, that the head of the proprietor is as heavy, and as clumsy as the lead appended to his diploma. Learned dullness and stupidity, have nothing to recommend them. "Talent, without education, is incomparably better than stupidity with it." We can acknowledge no substitute for good sense—nothing that can supply the lack of brain. Good sense is indispensable to the Judge; and it is as certain that it ought to be good sense well disciplined.

It is with great respect, and at the same time with considerable earnestness, suggested to the Legislature, that this most important, and very difficult branch of the administration of justice ought to be committed to the Justices of the Supreme Court; and that one of them ought to hold the Orphans' Court.

A plurality of persons, in Courts constituted for the purposes of account, equity, and distribution, is not only unnecessary, it is absolutely injurious. It is obvious that but one can do the duty, and the result is, that those who do not aid, must mar. "*Non numero pluribus, sed sapientia et virtute majori.*" is the advice of the Roman Orator and Consul. By whom the wisdom of that injunction and advice, has been denied I have never heard.

The foregoing remarks are with great diffidence and the highest respect submitted to the Legislature. They are sent forth with much hesitation, not from one doubt of their truth and importance, but from reasons which will readily suggest themselves to the elevated and generous mind.

The bill in its details is so closely assimilated to that respecting the Ordinary and the Prerogative Court, that any further observation is deemed entirely superfluous.

A BILL,

Entitled "An Act concerning Surrogates."

Section 1. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. The Surrogates of the several and respective counties of this state, shall have full power and authority in concurrence with the power, jurisdiction and authority of the Ordinary, to take the proof of last wills, testaments, and codicils of all deceased persons, who at, or immediately previous to their death, shall have been inhabitants of the respective counties of such Surrogates, in whatever place the death of such persons may have happened, and to make, adjudge and record probate on the same :

2. And to grant letters testamentary, according to law :

3. And to grant letters of administration of the goods and chattels, rights and credits, at the time of their death, of all such persons dying intestate :

4. Or with the will annexed, when the same shall be requisite :

5. And also to grant letters of guardianship, of the persons and estates of orphan children, within their respective counties and in all other proper cases within the same bounds.

6. Such letters testamentary, letters of administration and letters of guardianship, shall be in the nature of commissions, and shall be made in the name of this state and tested in the name of the Surrogate who shall grant the same, and sealed with the seal of the office of the said Surrogate.

Sec. II. *And be it enacted by the authority aforesaid,* That—

1. In addition to the security by law required from the administrators and guardians, every person who shall receive letters testamentary, letters of administration, or letters of guardianship, from the Surrogate of any county, or from the Orphans' Court of any county, except in the case of a husband administrator of the goods, chattels, and credits of his wife, shall before receiving letters, become bound to this state, by recognizance in such sum, as the said Surrogate, or the said

Orphans' Court, as the case may be, shall direct, upon condition, that such executor, administrator, or guardian, shall and will well and faithfully execute the trust reposed in him as such executor, administrator, or guardian, and shall and will well and faithfully obey and perform all such orders, and decrees, as the said Surrogate, the Orphans' Court or the Prerogative Court may or shall lawfully make of and concerning the administration of the estate so committed to him, or of and concerning the care, custody, and guardianship of the said ward, so committed to him as aforesaid, as the case may be.

2. The recognizance, or recognizances before mentioned may be taken before the Surrogate, or before the Orphans' Court, or before any one of the Masters of the said Court, and shall be binding and obligatory upon all and every of the recognizors, and upon all their lands, tenements, hereditaments, and real estate, according to the term of the recognizance, wheresoever within the bounds of the proper county of such Surrogate, or Orphans' Court, the said lands, tenements, hereditaments, and real estate may lie or be situate.

3. All recognizances, so as aforesaid, to be entered into by executors, administrators, or guardians, shall be for the security, use, benefit, and interest of all and every person aggrieved in and through the default, delinquency, unfaithfulness, negligence, or insolvency of the said executors, administrators or guardians respectively.

4. The recognizance, or recognizances to be taken by virtue of this act, may by permission of the Orphans' Court of the same county be prosecuted before the same Orphans' Court or before other competent tribunals by *scire facias*, and upon the return *scire feci* on one writ of *scire facias*, or upon the return *nihil* on two writs of *scire facias*, judgment shall be entered with costs, unless the defendant or defendants mentioned in the said writ or writs, or some, or one of them shall make affidavit of merits, and on such affidavit shall obtain leave to plead; and then, and in that case, the defence shall be confined to the matters sworn to, or affirmed, unless the Court for just cause and on reasonable terms, shall permit other matters to be pleaded.

5. After judgment shall have been entered on any writ of *scire facias* on forfeited recognizance, as before mentioned, either by default, or on trial, the Orphans' Court aforesaid, or

other competent tribunal, before whom the judgment shall have been entered, may and shall, from time to time assess the damages which any petitioner whatsoever, may have sustained by reason of the neglect, delinquency, unfaithfulness, or insolvency of any such recognizor ; and award and issue execution thereon with costs, to and for the use, interest and benefit of such aggrieved petitioner, his executors, or administrators ; and therein cause right and justice to be done : Provided that the said damages so to be assessed from time to time as aforesaid, shall not in the whole exceed the amount set forth in the said recognizance.

6. Before letters testamentary, letters of administration, or letters of guardianship shall issue, either from the Surrogate, or the Orphans' Court, the person named therein as executor, administrator, or guardian, as the case may be, shall take and subscribe an oath, or affirmation, before the Surrogate, or before one of the Masters of the Orphans' Court, that he will well, faithfully and honestly discharge the duties of such executor, administrator, or guardian.

Sec. III. *And be it enacted, by the authority aforesaid,* That—

1. The Surrogate of each of the several and respective counties of this state shall hold a Surrogate's Court, at the Surrogate's office in the said county.

2. The said Court shall be a Court of record, and shall not be confined to terms, but shall be always open for the transaction of business, on the days, and at the hours usually employed in secular business.

3. The Surrogate in the said Court, shall have full power and authority, and it shall be his duty to enquire into the truth of the facts, and to hear and determine all disputes and controsies within his jurisdiction, respecting

The existence of last wills, testaments and codicils :

The proof of last wills, testaments and codicils :

And the right of executors therein named, to letters testamentary thereon.

4. The Surrogate in the said Court, shall have full power and authority, to require and compel the production and exhibition by any executor, or other person, of any last will, testament, or codicil, or other paper in the nature of a last will, testament, or codicil, in his possession, or under his control

being : to the end that the same may be proved, if according to right and truth, the same can, or ought to be proved.

5. The Surrogate in the said Court, shall also enquire into the truth of the facts, and hear and determine all disputes and controversies within his jurisdiction, respecting

The right of administration :

The truth, fullness and fairness of inventories :

The right of guardianship.

6. He shall in the said Court, correct and amend all errors and mistakes in the accounts of executors and administrators ; and shall decree the allowance and settlement of the said accounts when amended, corrected and audited by him, according to law.

7. He may compel obedience to his decrees, by attachment, imprisonment and distress.

8. The sheriff, coroners and constables of the several counties of this state, shall be the ministerial officers of the Surrogate's Courts, in and for the said respective counties, and shall execute the writs, precepts and process issuing out of the said Courts respectively, and to them respectively directed and delivered, and shall make true return thereto, according to the command in the same.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. Before letters of administration shall be granted by any Surrogate, on the estate of any person who shall have died intestate, the fact of such person dying intestate, shall be proved to the satisfaction of the Surrogate.

2. He shall examine the persons applying for such letters on oath or affirmation, touching and concerning the time, place and manner of the death ; and whether or not the person so dying, left any last will, or testament ; and also touching and concerning the amount, nature, character and value of the estate to be administered upon : and the said examinations shall be reduced to writing, subscribed by the examinants, and affiled in the office of the said Surrogate.

3. He may in like manner examine any other person, and may compel such person to attend as a witness for that purpose.

4. And to that end the Surrogate's writ of subpœna, and the writ of attachment, if need be, may be awarded, and sent into

any county of this state, and shall be obeyed and served by all executive officers and other persons, to whom the same shall come, or be delivered.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. To the end, that all persons in interest, may have a full and fair opportunity to contest the accounts of executors and administrators, as well in the inventory and appraisement, as in the charge and discharge; no account reported by any executor, or administrator, without citation, monition, or process against him for that purpose, shall be decreed, or finally passed upon, until after such reasonable notice as the Surrogate's Court shall by rule direct.

2. All executors and administrators, after the expiration of twelve months from the time of the issuing of their respective letters, may be required to render account.

3. And for this purpose, any creditor, legatee, next of kin, devisee, heir, or other proper person, may petition for monition, citation, or other proper process, to answer and account, and the same shall be accorded.

4. Obedience to the said process of the Court, may be compelled by fine, imprisonment and distress infinite.

5. On service of the citation, monition, or other process, according to law, and the same being returned and certified to the Court, the executor, or administrator, or other person required to account, may be considered as in court, and may be proceeded against forthwith, according to law and the rules of the Court.

6. If any executor, or administrator, shall avoid, or evade the service of process to answer and account; or shall reside out of this state, so that he cannot be served with process, then it shall be lawful for the Court, by rule, to direct reasonable publication, and to adjudge the same, constructive service of the process, and thereupon to proceed against the said executor, or administrator, as being in Court.

7. Exceptions may be taken and filed against the accounts of executors, or administrators, exhibited in the Surrogate's Court, within such time as the Court shall by rule direct. And the same shall be enquired into, examined, and finally decided by the Surrogate in the said Court.

8. The Surrogate shall have full power to cause to come before the said Court, all parties and witnesses, and them, or any of them, to examine, or cause to be examined, on oath or affirmation, touching or concerning any matter or thing in the said accounts, or exceptions specified, or set forth, or otherwise, there in controversy; and if any party, witness, or other person, shall in such examination swear, or affirm falsely, or corruptly, such party, witness, or other person, shall be deemed guilty of wilful and corrupt perjury; and on conviction, shall be punished as such.

SEC. VI. *And be it enacted by the authority aforesaid*, That—

From any sentence, order, judgment, decree, or other proceeding made, had, or rendered, or to be had, made, or rendered, by any Surrogate, in the said Court, or by virtue of this act, whether the same be interlocutory, or collateral, definitive, or final, any, or either party thereby aggrieved, may appeal to the Orphans' Court of the same county, and seek redress; and the same appeal shall be granted on the following terms, and in the circumstances following, and in no others :-

1. Where the sentence, order, judgment, decree, or other proceeding shall be interlocutory, or collateral, the said appeal shall be taken and made, according to the rules of the Orphans' Court, within one year after the making and entering such sentence, order, judgment, decree, or other proceeding.

2. Where the sentence, order, judgment, decree, or other proceeding, shall be definitive or final, then, and in that case, the said appeal therefrom, shall be demanded and taken, within three years next after the making and recording, or enrolling, as the case may be, of such definitive, or final sentence, order, judgment, decree, or other proceeding.

3. The said appeal shall be by petition to the Orphans' Court, and by order thereon.

4. The narrative part of the petition of appeal shall be verified by affidavit, or on failure thereof, the petition shall not be affiled in the Orphans' Court; unless the Orphans' Court under special circumstances shall allow the same to be affiled without verification.

5. The appellant shall make such reasonable deposite in the Registry of the Orphans' Court, to meet the costs, char-

ges and expenses of the said appeal, as the Orphans' Court shall by rule direct.

6. The return of the Surrogate to the order of appeal, shall be full and without denial, and without delay.

7. The answer of the respondent may be required to be verified, as the Orphans' Court, under the circumstances of the case, shall think just and reasonable.

8. Contumacy for defect of answer to the appeal, shall not be adjudged, unless the rule, or order for answer, shall have been personally served.

9. It shall be in the discretion of the Orphans' Court to allow additional evidence on the trial of the appeal, or to confine the parties to the evidence received in the Surrogate's Court; or before the Surrogate, according as it shall seem to be equitable and just.

10. The decree upon the trial of the appeal in the Orphans' Court, shall be executed according to right, by the process and order of the Orphans' Court, if need, and the matters and things removed into the Orphans' Court by the appeal, shall in no case be remanded to the Surrogate, or to the Surrogate's Court.

REMARKS UPON THE BILL

Entitled "An Act concerning Surrogates."

Sec. I. The Surrogates of the counties are no longer the deputies of the Ordinary. They are public officers of the State, and are required to perform various and important duties in virtue of their offices. It seems, therefore, to be clearly proper to ascertain their local and territorial jurisdiction, as well as the subjects matter of their cognizance. The place *where* a will ought to be proved, or *from whence* letters of administration ought to issue, has been the subject of *contestation* in a variety of shapes in this state, ever since the passing of the act 9th Nov. 1803. The question is still unsettled.

It is very respectfully suggested to the Legislature, as a general rule, that the will ought to be proved in that county in

which the deceased shall have been an inhabitant *at* or *immediately previous to his decease.* By this rule, numerous controversies arising from the question of place of assets, goods, or credits to be administered, *bona notabilia,* will be totally avoided.

The conflict of jurisdiction, which has sometimes unhappily taken place, can no longer be renewed. Of course none of these questions ever could, or can arise in cases where the will is originally offered for proof before the Ordinary. His jurisdiction, by the terms of the Constitution, must be general, and in cases of foreigners and non-residents it will be exclusive.

Sec. II. Relates to a very important and interesting subject: but it is one on which already I have had the honor of stating my views to the Legislature. I do not know that I have one word to add, except my earnest desire, that some such plan may be adopted: And my humble prayer to Heaven that it may prove one of the effectual means of protecting and defending the invaded rights of the widow and the fatherless.

Sec. III. Very-many of the duties of the Surrogate are judicial. His judicial acts are to be *recorded* and enforced. That he ought to hold a Court of Record then, seems to follow as a natural consequence: And that his Court should be always open, is claimed by universal convenience.

The authorities given to him in 3, 4, 5, 6, and 7, are very moderate, and are founded on the belief, that many of his acts and orders will be in plain cases and in small estates, where the more expensive interference of the Orphans' Court ought to be avoided.

Sec. IV. A rational construction of the authority given to a Surrogate, to issue letters of administration, on the estate of a deceased intestate, would certainly require him to ascertain the two facts *death* and *intestacy.* But we have seen in experience many letters issued, certainly without such ascertainment, and probably without inquiry; or if any inquiry have been made, it has been so loose and inefficient, that in some instances results the most incongruous and ridiculous have occurred.

These things certainly are not common—God forbid that they should be.

The injunction of caution contained in this section, it is hoped, will be attended with good results.

Sec. V. Is closely analogous to the corresponding section in the bill reported, concerning the Ordinary, and the Prerogative Court.

If authority ought to be given to the Surrogate, to decide the questions that shall arise in his Court, it follows that he ought to have the means of inquiring into the facts, and of compelling witnesses to attend and to testify.

Sec. VI. Is intended to give to all parties an appeal to the Orphans' Court, and that it shall be as easy and familiar, as the nature of the case will at all warrant. The right of review has always been cherished, and highly favored in New-Jersey; and it is not sought to abridge it here, but to preserve it in most healthful vigor.

The rules appended, are thought to be just and reasonable. The right to require verification, is in conformity with the rules and principles of the civil law. Retaining the cause in the Court of appeal, in any further proceedings, that may be deemed necessary, or for the purpose of execution, must be convenient to the parties, must advance justice and prevent delay.

A BILL,

Entitled "An Act concerning Wills."

Section I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. It shall be lawful for every male person of the age of twenty-one years, and of sound and disposing mind and memory, to dispose of his property by last will; as well that he may have at the time of making such will, as that which he may afterward acquire and have at the time of his death: and that whether the same property be real or personal, consisting of lands, tenements or hereditaments, goods, chattels, or effects, rights or credits; and of all the estate and interest which he may have therein, in his own right, whether the same be in pos-

session or action, remainder or revision, law or equity: And whether the same estate or interest, or any part thereof, be held as allodial, in fee simple, or for the life or lives of any other person or persons, or whether in severalty, joint tenancy, coparcenary, or in common.

2. Every such last will shall be made in writing, and shall be signed or acknowledged to have been signed by such testator, and declared by him to be his last will in the presence of at least three credible witnesses, who shall subscribe their names thereto as witnesses, in the presence of the testator, and at his request.

3. The signing of such testator shall be by subscribing his name thereto, if he can write, and if he cannot write, then by making his mark; and if he can neither write nor make his mark, then by some other person subscribing his name for him in his presence and at his request.

4. The declaration of such testator that the same is his last will, shall be made by express words if he can speak, and if he cannot speak, then by such significant signs as shall satisfy the witnesses that he intends the same to be his last will.

5. Every devise that hereafter shall be made by any testator of his real estate, or in any other terms denoting his intent to devise *all* his real property, shall be deemed, construed, and taken, to pass all the real estate, which such testator shall be entitled to devise at the time of his death: Provided, nevertheless, that the said devise shall be signed, declared, and attested, in the manner aforesaid, and in the presence of three credible witnesses at the least.

6. Every last will, or declaration in the nature of a last will, not made in writing, except as hereinafter is excepted; and every last will or instrument purporting to be a last will, though made in writing, if not signed, declared and attested, in manner aforesaid, in the presence of three or more credible witnesses, as aforesaid, shall be utterly null and void.

Sec. II. *And be it enacted by the authority aforesaid*, That—

1. Every person who shall subscribe his or her name to such will as a witness, and at the time of subscribing the same shall be of the age of fourteen years, and of sound mind, and shall be no way disqualified by law to bear testimony in other cases, shall be adjudged to be a *credible witness*.

2. If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest, or appointment, of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, then and in that case such person shall, notwithstanding said devise, legacy, or interest, or appointment, be adjudged to be a credible witness, and compellable to testify respecting the execution of the said will: but in that case, all and every devise and devises, bequest and bequests, legacy and legacies, given, or intended to be given, in and by the said will, to such witness, for his or her own benefit, and not in trust for the benefit of another, or others, shall be utterly void and of none effect; and the thing so to such witness devised or bequeathed or given, shall be adjudged to be undisposed of by such will, and shall go as in case of intestacy.

3. If any person shall be the subscribing witness to the execution of any will, wherein he or she shall be appointed executor, trustee, or guardian of younger children, or shall have any profitable appointment therein, and the said will cannot be proved without the testimony of such witness, such person shall, notwithstanding such appointment, be adjudged a credible witness, but in that case such appointment shall be utterly void; and if there be another or others, appointed in the same will, then such other or others shall take such executorship, trust or guardianship, as the case may be, in the same manner as if the said subscribing witness had not been therein appointed; and if there be no other or others appointed in such will, then administration with the will annexed shall be granted, and the administrator or administrators shall administer the estate, and shall execute the trust, if there be a trust, according to the directions of the will; and the guardianship, if need be, shall be provided for as in other cases, when no guardian is or hath been appointed.

4. Every person who shall subscribe his or her name to such will as a witness, who shall have a prior debt or debts due from such testator, or from any other, or shall have any other duty or duties to be performed by such testator or any other, and the said debt or debts, duty or duties, shall by such will be charged upon the estate of such testator, for the better securing the payment or performance thereof only, leaving the original

liability still subsisting, or who shall have any other indirect, uncertain, or contingent interest in such will, shall notwithstanding such charge or such other indirect, uncertain or contingent interest be adjudged to be a credible witness: and in all these cases such persons adjudged to be credible witnesses, as aforesaid, may be called and examined as such upon the probate of the said will in the proper court, and if necessary may be brought in by compulsory process: But the testimony of such witnesses nevertheless, shall not be conclusive in such court, but may be questioned by other evidence, either positive or circumstantial.

5. No person who shall subscribe his name to such will as a witness, and at the time of subscribing the same, shall not be of the age of fourteen years, and of sound mind, or shall be in any way disqualified by law to bear testimony in other cases, shall in any wise be adjudged a credible witness, within the meaning of this act, nor shall such person be admitted as such upon the probate of such will.

Sec. III. *And be it enacted by the authority aforesaid,* That—

1. No last will, made, declared, and attested in manner aforesaid, nor any part thereof, except in the cases hereinafter mentioned, shall be revoked or altered, otherwise than by some other will in writing: Or some other writing of the testator, declaring such revocation or alteration, and executed and attested, with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same by the testator himself, or by some other person in his presence, and by his direction and consent: and when so done by such other person the direction and consent of the testator, together with his intention to revoke the said will, and the fact of such injury or destruction of the said will, shall be proved by at least two witnesses.

2. Every last will, made and declared and attested, in manner aforesaid, shall be considered as revoked by construction of law, if the testator marry after the making of such will, and have issue of such marriage, born either in his life time or after his death, and the issue of such marriage shall survive the said testator: unless such issue shall be provided for prospectively by such will, or otherwise, or shall be so mentioned or

referred to in the will itself as to make it manifest, without other evidence, that the testator did not intend to make provision for such issue; and no other evidence to rebut such constructive revocation shall be received.

3. Every last will made, declared, and attested, in manner aforesaid, by any unmarried woman, the making of which is herein provided for, shall be considered as revoked by construction of law, if she shall afterwards marry, and shall die during the coverture; but if she shall not die during the coverture, but shall survive her husband, then such will shall be again revived, and if not afterwards revoked, shall take effect at the demise, as if no such marriage had taken place.

4. No last will made, declared, and attested, in manner aforesaid, nor any devise therein contained, shall be considered as revoked by construction of law, because the testator, after the making of such will, may have entered into covenant, or agreement, even for valuable consideration, to sell and convey the lands so devised, or any part thereof; nor because the testator, after the making of such will, may have charged the lands so devised, for securing the payment of money, or for the performance of covenants: nor because the testator, after the making of such will, may have done any other act or thing, by which his estate or interest, in the lands and real estate so devised, may be incumbered or made worse; provided the estate and interest therein be not wholly divested, but such last will shall be maintained, and take effect, and such devisee shall take the lands so devised, subject to such covenant, agreement, or charge; and in this case, the said devisees shall have such aid from the personal estate of the testator, for the discharge of such incumbrance, in whole or in part, as may be agreeable to equity.

5. Whenever a testator, after the making his will, shall sell and convey the lands so devised, and shall afterwards re-purchase the same lands, or the same lands shall descend to him, or be devised to him; the said will shall in no wise be considered as revoked.

6. The revocation of a last will, by construction of law, shall in no wise revive or set up any former or prior will which may have been made by such testator; nor shall the cancelling, obliterating, burning or otherwise destroying of

any last will ; or the express or written revocation thereof, be adjudged to revive or set up any former or prior will, which may have been made by such testator ; unless it shall appear by the terms of such revocation, if the same be in writing, or by the declaration of the testator, at the time of the cancelling, obliterating, burning, or destroying, if the revocation shall have been by cancelling, obliterating, burning, or destroying, that it was the intention of such testator to revive and set up the said former or prior will ; or unless after such revocation or destruction, the said testator shall duly republish such prior or former will.

7. If the testator be disseized after making his will, and shall die before re-entry, the said disseizen and death shall not be construed to operate a revocation of the devise or devises contained in said will.

8. Whenever a testator shall have a child or children, born after the making of his will, either in his life time or after his death, and shall die leaving such child or children so after born unprovided for by any settlement ; and neither provided for, nor in any way mentioned in the will, such will shall not therefore be adjudged to be revoked, but every such child, so after born, shall have right and interest in the estate, real and personal, of his or her father, in like manner as if the father had died intestate ; and the same shall be adjudged to him, her, or them, accordingly ; and the same shall be taken from the devisees and legatees, in just proportion.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. It shall not be necessary, in any last will, made, declared, and attested in manner aforesaid, in order to pass by devise an estate in fee simple, in lands, tenements, or hereditaments, to use the word "heirs," or the words "heirs and assigns," or other technical language ; but if the testator shall devise all his estate in such lands, or shall use other words making it manifest that he intended to devise all his estate in the same, in general terms, and shall annex no limitation or qualification, as for life, or for the life of another, or for a less estate, and shall make no devise over the said lands after the death of such devisee, then the same shall be taken, and it shall be understood, to be the intention of the testator thereby

to pass an estate in fee simple, if he had a fee simple in the same; and if he had not a fee simple therein, then the said devise shall be adjudged to pass the whole of such other estate and interest therein, which the said testator may have had at the time of his death.

2. If in any last will and testament, made, declared, and attested in manner aforesaid, the testator shall devise lands to two or more persons, either in fee simple, or for a less estate, and do not express therein the tenure by which they shall hold the same, it shall be considered that he intended to create thereby a tenancy in common and not a joint tenancy, and such devisers shall hold such lands as tenants in common accordingly, and not as joint tenants.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. If in any last will made, declared, and attested in manner aforesaid, there shall be a devise of lands or bequest of chattels to a child or grand child of such testator, and such child or grand child shall happen to die, during the life time of the said testator, leaving issue which shall survive such testator, such devise or legacy shall not be considered as a lapsed devise or legacy, but the thing so devised or bequeathed, shall go as if such devisee or legatee had survived the testator and then died intestate.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. If in any last will made, declared, and attested in the manner aforesaid, the testator shall give, devise, or bequeath, lands, tenements, hereditaments, goods, chattels or effects, to any person or persons, bodies politic or corporate, incapable in the law of taking and holding the same, or to or for any use or trust contrary to the policy of the law, then such gift, devise, and bequest, shall be utterly void, and the thing so given, devised or bequeathed, shall go as in case of intestacy.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

1. It shall and may be lawful, for every unmarried woman, of the age of twenty-one years, and of sound and disposing mind and memory, to dispose of her estate, real and personal, by last will made, declared and attested in manner aforesaid; and that such disposition shall in all things have the same force and effect, and be subject to all the enactments, rules,

regulations, conditions and restrictions, herein expressed in the case of male persons.

2. But it shall not be lawful for any married woman, to make such disposition of her estate, real or personal, by last will or otherwise, unless the right of making such disposition, shall have been secured to her by marriage settlement, or some other covenant, contract, or trust, made for that intent, and recognised in the Courts of Law or Equity as being sufficient for that purpose.

Sec. VIII. *And be it enacted by the authority aforesaid*, That—

1. It shall or may be lawful for any soldier, being in actual military service, whether in garrison, or on the field; and for every mariner and seaman, being at sea, whether in the military or mercantile marine, by last will, without writing, to dispose of his moveables, wages and other personal estate, in the same manner as he might have done before the passage of this Act.

Sec. IX. *And be it enacted by the authority aforesaid*, That—

1. Every last will made, declared, and attested in manner aforesaid, after the same shall have been proved in due form of law, in the proper court having probate of the same, and shall be there recorded, shall be deemed sufficient to convey and assure any lands, tenements, hereditaments, goods, chattels, or effects therein devised, bequeathed, or given, as effectually to all intents, constructions, and purposes, as if the testator had conveyed the same by deed in his life time; and the same will, when so proved, and recorded, but not before, may be given in evidence in any Court of Justice in this State, without further proof thereof; and so also the book of records in which the same is recorded, or a transcript of the same exemplified by the proper officer, may be given in evidence as aforesaid. But though as well such will itself, as the record and transcript thereof, shall be received as plenary evidence in the first instance, yet in any trial at law, before a Jury of the Country, where any devise in the said will contained shall come into question, the said evidence may be questioned by contrary proof.

Sec. X. *And be it enacted by the authority aforesaid*, That—

1. Every last will made, declared, and attested in manner aforesaid, shall in all courts of law and equity, in this State, be construed, not strictly, according to the letter, as deeds are

sometimes construed, but liberally according to the true intent and meaning of the testator, to be collected from the whole will taken together; and that the term "*last will*" used in this act, shall be construed to include and extend to all testaments and codicils as well as last wills.

REMARKS UPON THE BILL

ENTITLED "AN ACT CONCERNING WILLS."

I have endeavored to collect together, and to arrange into ten sections, the provisions of our statutes, and some of our most prominent principles in relation to wills and testaments.

SECTION I. 1. *Recognises* the right of testament and devise, as extensively as the power of alienation or grant can be, in all male persons who have attained the age of twenty-one years.

2, 3, and 4, Of this section prescribe the manner of *making*, *signing*, and *attesting*, in conformity with the existing statutes, and the repeated decisions thereon.

5. Is intended to guard against an occurrence that has frequently taken place, and has almost as often been lamented. I mean *adjudged intestacy*, with respect to *after acquired real estate*.

The distinction, purely technical, between the effect of general terms in a devise of real estate, and a bequest of personal property, has often been exhibited as a reproach to the law. A bequest of *all* a man's *personal estate*, passes all the property of that description owned by him at the time of his death; while a devise of all his lands, &c. is confined in its operation to the lands owned by him at the time of the making of his will, or of the last publication of it.

"The right and power of bequeathing is coeval with the first rudiments of the law."—"We have no traces or memorials of any time when it did not exist." And, altho' it is said, upon high authority, that lands were devisable by will before the Norman conquest; yet it is certain, that the introduction of military tenures, tended greatly to restrain the practice and

the right; so that it very soon became the declared doctrine of the common law, that no greater estate than for a term of years, could be disposed of by testament.

The statutes of wills 32 Hen. 8, c. 1, and 34 Hen. 8, c. 5, are the origin of devises as at present understood.

By these statutes it was enacted, among other things, that all persons *having* any manors, lands, &c. might, by will and testament, in writing, devise the same to any person, in fee simple, fee tail, for life, or for years, at pleasure.

The Statute 29, Car. 2, c, 3, prescribes the manner of *making, signing* and *attestation*, which shall be required.

Under these Statutes, it was in early day decided, that a will of lands was not so much in the nature of a testament, as of a conveyance, declaring the uses, &c.—that it was essential to the devise of real estate, that the testator *have a present interest*, capable of disposition, and a continuance of it to the period of his death—that a devisee should take as a purchaser—and that *after acquired lands* should not pass by devise.

It is very obvious that the technical reasoning which supports the foregoing, must in many instances, entirely frustrate the intent of the testator. It requires no little acquaintance with the history of the law, to understand the nature of this reasoning; and when understood, it is not always approved.

As it is, the evil must be endured, until the Legislature, in their power and wisdom, shall apply the corrective.

Several of the states of this union, have adopted the principle here recommended.

6. Is intended to place all wills and testaments, whether of real or personal estate, on the same footing.

It is not easily to be perceived, that there ever was a just and substantial reason for the wide distinction assumed and supported. But if, in early times, personal property was very little regarded; if an undue partiality for primogeniture, on the one hand; or a morbid jealousy of it on the other, caused the subject of lands, tenements and hereditaments, to require the peculiar and principal attention of the tribunals of justice; and if from these, or any other causes, infants and children were authorized to alienate in death, what they could not in life; surely these causes can have no operation now.

The immense augmentation of the value of personal estate, seems to require, the same certainty of rule in its disposition by testament, as has heretofore been thought necessary in a devise of lands.

Section II. 1. Prescribes the qualifications of witnesses. 2 and 3 Of this Section relate to devisees, legatees, executors, trustees, and testamentary guardians, being in certain cases offered as witnesses, and being compelled to testify. In all such cases, the legacy, devise, or appointment, is declared void.

The competency and the credit of such witnesses was restored by the Stat. 25, Geo. 2, c. 6, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. Our Statute of wills, 16th Nov. 1795, contains the same provisions.

It is hoped that the Section reported is drawn with precision and plainness.

It will be perceived that 2 and 3 of this Section, provide for the case *where the will cannot be proved without the testimony of such witness.* Cases may arise, where it would seem just and right to save other interests of the witness. For example, if a child of the testator should, through mistake, or ignorance, witness a will, in which no more than his portion as one of the heirs at law of the testator should be devised to him ; in this case it would shock our sense of justice, that the son should be compelled to testify, and lose by the hard command of law his inheritance, together with his devise.

I do not feel authorized to introduce a principle so entirely new into the bill reported ; but with the foregoing explanation, I respectfully suggest to the Legislature the following number to be inserted in this section, and following immediately after No. 2.

3. *But if such witness would have been entitled to any share of the testator's estate, real or personal, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him or her, as will not exceed the value of the devise or bequest made to him or her in the will; and he or she shall recover the same of the devisee, or legatee, or from the devisees and legatees named in the will, in proportion and out of the parts devised and bequeathed to them.*

The remaining numbers of this section are conformable to the existing law, except the last which has already been animadverted upon.

Sec. III. Treats entirely of revocation.

1. Is in conformity with the first section of our statute of wills 16th Nov. 1795.

2. It has been adjudged repeatedly, and for a long course of years, that marriage and the birth of issue shall operate rather as *presumptive* than *constructive* revocation of a will previously made.

It follows, that there is great uncertainty in the qualifications of the rule, and hence arise almost endless contests. The principle thus broadly adopted by the Legislature, it is hoped will be salutary in the settlement of the law, and the removal of doubts. Vide Douglass 30 to 37, 5, D. and E. 51 in notis, 2 Phillimore 261, 266.

3. This is in strict conformity with the uniform current of respectable decisions on this subject, 4 Coke 60, Goulds. 100, 2 Pr. Wm. 524, Plowden 343, Godolphin 29.

4 and 5. The implied or presumptive revocations adjudged in England, in respect to *changes of interest in the lands devised, prior to the testator's death*, have so often defeated the obvious intention of the testator and worked so much iniquity, that it is esteemed not necessary to do more than to present the subject to the legislature. 3 Burr, 1491, Douglass 722, 2 Freeman 202, Moore Rep. 789, Ambler 215.

6. The necessity of a rule uniform is obvious.

7. It has been doubted by learned and sagacious lawyers, whether the principle of the common law, that *if a testator be disseized after making his will, and die before re-entry, the disseisin will be a revocation*, be the law of this state. I will not peremptorily answer, but that there may be some difficulty in the solution of that doubt.

That it is, and has been a received doctrine in England ever since the passing of the statutes of wills, is unquestionable. 1 Roll. Abr. Til. Devise.

In New-Jersey, I have not heard of but three cases since the revolution, where the question has been brought before the court judicially and in form. The first of these was at the

Morris Summer Assizes, before Brearly, C. J. and Symmes, J. in June 1787. The second was at Hunterdon Nisi Prius in May 1793, before Kinsey, C. J. and Smith, J. And the third was at Monmouth Circuit in Oct. 1790, before Kirkpatrick, J. and Boudinot. J.

These very learned and intelligent judges, it is understood, concurred in opinion, that the devise was revoked by the disseisin.

I have been informed that a similar opinion was given in the Circuit Court U. States, for this district, by Judges Chase and Morris.

There surely ought to be no doubt left on this subject.

8. This is in accordance with our statute relative to posthumous children, passed 24th June, 1799.

SECTION IV. 1. This is slightly varied from the statute 26th Nov. 1784, and is intended to comprise, as well the enactment in the first section of that statute, as the great principle of the decisions under it.

2. Is in conformity with the existing law.

SECTIONS V, VI, VII and VIII. The justice and propriety of the provisions in these sections, are supposed to require no comment.

SECTIONS IX and X. Are according to the existing law, and no reason is known why there should be any change with regard to them.

AN ACT

Concerning Executors and Administrators.

SECTION I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. Actions of account, and all other actions founded upon contract, may be maintained by, and against executors, in all cases in which the same might have been maintained by, or against their respective testators.

2. Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate.

And shall answer, and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.

3. Executors and Administrators shall have action of trespass, case, or other suitable form of action, against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator, or intestate in his life time.

4. Any person or his personal representative, shall have action of trespass, case, or other suitable form of action, against the executor or administrator of any testator or intestate, who in his life time shall have wasted, destroyed, taken or carried away, or converted to his own use, any goods, chattels, or estate of any such person.

5. The executors and administrators of any person, who as executor, either of right, or in his own wrong, or as administrator, shall have wasted, or converted to his own use, any goods, chattels, or estate of any deceased person, shall be chargeable in the same manner, as their testator or intestate would have been, if living.

6. Executors of executors shall have actions of debt, account, assumpsit, and of goods carried away of the first testator; and also actions of whatsoever kind they may be, which the first executors might have had in their life time; and they may and shall have execution of judgments obtained by, or recognizances made to the first testator in any court of record, or other competent jurisdiction, in the same manner as the first testator, or the first executors would have had, if he or they, were in life; as well of actions of the time past, as of the time to come.

7. Executors of executors shall be answerable to others, in actions of debt, assumpsit, and of goods carried away by the first testator; and shall be liable to execution of judgments, obtained against, or recognizances made by the first testator in any court of record, or other competent jurisdiction, so far forth, as they shall have assets to meet the same, according to law, in the same manner as the said first testator, or the first

executors should do, or be liable to, if he or they were in life, as well of actions of the time past, as of the time to come.

8. Executors and administrators shall have the like actions, founded either upon tort, or contract, which their respective testators, or intestates would have had, if they respectively were in life ; as well of actions of the time past, as of the time to come.

Save only, and except, actions of slander, libel, assault, battery, false imprisonment, and actions on the case for injuries to the person of the plaintiff, or to the person of the testator, or intestate of any executor or administrator.

9. Executors and administrators shall answer to others, and be liable to the like actions, founded either upon tort, or contract, which their respective testators, or intestates would have been liable to, if they respectively were in life ; as well of actions of the time past, as of the time to come.

Save only, and except, actions of slander, libel, assault, battery, false imprisonment, and actions on the case, for injuries to the person of the plaintiff, or to the person of the testator, or intestate of any executor or administrator.

10. Every person who shall obtain, or receive any goods, or debts of the estate of any intestate, or a release, or other discharge of any debt, or duty which belonged to any intestate from any administrator of such intestate upon any fraud, whereby the creditors next of kin or others entitled to distributive share of the estate of such intestate, may be injured, or without full and valuable consideration, such person shall be chargeable as executor in his own wrong, to the value of such goods and debts so obtained, or whereof or wherefrom, he shall be so released, or discharged ; deducting nevertheless all just debts due to him from the intestate, and all payments made by him, as the same ought to be allowed to lawful executors, or administrators in the course of administration.

Sec. II. *And be it enacted by the authority aforesaid*, That—

1. In actions against divers executors or administrators, all the executors or administrators shall be considered as one person, representing the testator or intestate ; and in case any of them shall be taken, or summoned upon any writ or process against them, such as do first appear, shall answer the plaintiff ; and if judgment shall pass for the plaintiff, the judgment

shall be entered, and the execution shall be awarded against such of them as have appeared, and all others named in the writ of process, to be levied of the goods and chattels of the testator or intestate, in the same manner, as if they all had been summoned, or taken, or had appeared.

2. No suit that shall be commenced, or shall have been commenced by any executors, or administrators, who shall die, be removed, or suspended from office, or be superseded, or who shall from any cause whatsoever become incapable of acting, shall be abated thereby, but may be continued by the co-executor, or co-administrator if there be any.—And if there be none, then by, and in the name of the person who shall or may be appointed to succeed the executor, or administrator, so dying, removed, superseded, suspended, or becoming incapable in the administration of the same estate.

3. If any suit shall be commenced against divers executors or administrators; and any one or more of the said defendant executors or administrators, shall during the pendency of the said suit happen to die, be removed, or suspended from office, or superseded or shall from any cause whatever become incapable of acting; such suit shall in no wise be abated thereby, but the same may be continued against the surviving executors or administrators if there be any. And if there be none, then the said suit may be continued against the person who shall be appointed to succeed the executors or administrators, so dying, removed, suspended, superseded, or otherwise becoming incapable in the administration of the same estate.

4. If any suit shall be commenced against a sole executor, or sole administrator, and during the pendency of the said suit, such executor or administrator shall happen to die, be removed, or suspended from office, or superseded, or shall from any other cause become incapable of acting; such suit shall in no wise be abated thereby, but may be continued against the person who shall be appointed to succeed the executor or administrator, so dying, removed, suspended, superseded, or otherwise becoming incapable in the administration of the same estate.

5. If an executor or administrator be defendant, in any suit pending at the time of the revocation or superseding his power as such, the plaintiff in such suit may, nevertheless, proceed against such executor, or administrator, in order to charge

him personally ; but no judgment recovered therein after such revocation, or superseding, shall be binding, or be of any avail as to the person succeeding to the administration of the same estate.

Sec. III. *And be it enacted by the authority aforesaid*, That—

1. An administrator *de bonis non*, may sue forth a *Scire Facias*, and have execution on any judgment obtained by, or in the name of any previous executor, or administrator of the same estate.

2. An administrator *de bonis non*, may sue forth a *Scire Facias*, and have execution upon any recognizance made in any court of record, or other competent jurisdiction, to any previous executor, or administrator of the same estate.

3. An administrator *de bonis non*, may bring a writ of *error* upon any judgment obtained against such previous executor, or administrator of the same estate, or against the original testator, or intestate ; and shall defend any writ of *error* brought upon any judgment obtained by the first testator, or the first executor, or administrator ; and shall have the like remedies in the prosecution, or defence of any action by, or against such previous executors, or administrators, and for the collection and enforcing of any judgment obtained by them, as they would have by law, if living.

4. No lands, or real estate, of any testator, or intestate, shall be sold, or in any wise affected, by virtue of any judgment, or execution against executors or administrators.

5. All sales made *bona fide* and lawful acts done by administrators, before notice of a will, shall remain valid and unimpeached by executors on any will afterwards appearing, or by any administrator *cum testamento annexo:* Provided, that such executors or administrators, *cum testamento annexo*, as the case may be, shall have the same remedy against the said previous administrators for the goods, chattels, and credits remaining unadministered, as before this act.

6. No executor, or administrator, shall be chargeable upon any special promise to answer damages or pay the debt of the testator, or intestate, out of his own estate ; unless the agreement for that purpose, or some memorandum, or note thereof, be in writing, and be signed by such executor, or administrator, or by some other person by him thereto specially authorized.

Sec. IV. *And be it enacted by the authority aforesaid,* That—

1. If any person die intestate, or if the executors named in any testament renounce the execution; or refuse, or neglect, for the space of forty days after the death of the testator, to prove such testament; then administration of the goods, chattels, and credits, of such intestate, or of such testator, *cum testamento annexo,* shall be committed and granted by the Ordinary of this state, by the Orphans' Court of the proper county, or by the Surrogate of the proper county, as the case may be, to the relatives of the deceased, if they, or any of them, will accept the same, in the following order: First, to the widow: Second, to the children: Third, to the father: Fourth, to the brother: Fifth, to the sister; Sixth, to the grand children: Seventh, to any other of the next of kin, entitled to share in the distribution of the estate: Eighth—But if none of them will accept the same, then letters of administration may be granted to any other proper person who will accept the same.

2. Where there shall be several persons of the same degree of kindred to the intestate, entitled to administration, they shall be preferred in the following order: First, males to females: Second, relatives of the whole blood: Third, unmarried women to such as are married.

And when there are several persons equally entitled to administration, the Ordinary, Orphans' Court, or the Surrogate, as the case may be, may, in discretion, grant letters to one, or more of such persons.

3. The husband, as such, shall be solely entitled to administration on the estate of his deceased wife; and shall be liable for the debts of his wife, only to the extent of the assets received by him as administrator.

If he shall not take out letters of administration on the estate of his deceased wife, he shall be presumed to have assets in his hands sufficient to satisfy her debts, and he shall be liable therefor.

And if he shall die, leaving any assets of his wife unadministered, they shall pass to his executors, or administrators, as part of his personal estate, but shall be liable for her debts to her creditors, in preference to the creditors of the husband.

4. If it shall so happen that letters of administration on the estate of a *feme covert* shall be granted to any other person

than her husband by reason of his infancy, absence, neglect, or refusal, or from any other cause : such administrator shall account for and pay over to such husband, or to his personal representatives, the assets remaining in his hands, after the payment of debts.

5. No letfers testamentary, nor letters of administration, shall be granted to any person convicted of an infamous crime, nor to any one incapable in the law of making a contract ; nor to an alien ; nor to one who is under the age of twenty-one years ; nor to any one who shall be adjudged incompetent to execute the duties of his trust, by reason of drunkenness, improvidence, or waht of understanding ; nor shall any letters of administration issue to any married woman ; but when any married woman is entitled to administration, the same may be granted, with her assent, to her husband in her right, and on her behalf.

6. No letters testamentary shall be granted to a married woman, unless her husband consent thereto in writing, and such consent be filed in the office whence the letters shall issue; and by giving such consent, the said husband shall be deemed responsible for the acts of the wife jointly with her.

7. Every person named in a will, or testament, as executor, and not named as such in the letters testamentary, or in the letters of administration *cum testamento annexo*, shall be deemed to be superseded, and shall have no power or authority whatever as such executor, until he shall appear, and be permitted to qualify and receive letters.

8. No executor named in a will or testament, shall before letters testamentary are granted to him, have any power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere with such estate further than is necessary for its preservation.

9. Limited administrations may be granted according to law in cases of infancy, absence, or suit pendency, and in other proper cases.

10. In case of the marriage of an executrix, or administratrix, the letters testamentary, or letters of administration as the case may be, shall be *ipso facto* suspended, so far only as they relate to such executrix, or administratrix.

And the said letters shall be so far as relates to the said executrix, or administratrix revoked, and finally and fully repealed and annulled ; unless the husband of such executrix or administratrix, shall within four calendar months from the day of his aforesaid marriage, give such security or additional security, as the Ordinary, Orphans' Court, or the Surrogate, as the case may be, shall order and direct, for the full and faithful administration, according to law, of all the assets of the testator, or intestate, which shall come, or which shall have come, to his hands, or possession, or which shall have come to the hands, or possession of his wife.

But such husband shall nevertheless, continue to be and remain liable for any fraud, embezzlement, waste, mismanagement, or other mal-administration of the same estate by his aforesaid wife.

11. The Ordinary, Orphans' Court, or Surrogate, as the case may be, shall determine the nature, effect, and extent of the said security so required to be taken from the said husband ; and whether the same shall be by bond, recognizance, or otherwise.—And the said security so to be taken, shall be pleadable and available in all Courts of this State.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. The Ordinary of this State, the Orphans' Courts of the proper Counties, and the Surrogates of the respective Counties of this State, may, and shall upon their respective granting and committing of administration of the goods, chattels and credits of persons dying intestate, take of the respective person or persons to whom such administration shall be committed, except where administration shall be committed to a husband, of the goods, chattels and credits of his deceased wife, sufficient bonds, with two or more able sureties, to be jointly and severally bound to this state, in such sum as the Ordinary, the Orphans' Court, or the Surrogate, as the case may be, shall think reasonable, not being less than twice the value of all the personal estate of which the deceased died possessed, or entitled unto, with condition to the effect following :

" The Condition of this obligation is such, that if the above bounden A. B. administrator of all and singular, the goods, chattels and credits of C. D. deceased, do make, or cause to be made, a true and perfect inventory of all and singular the

goods, chattels and credits of the said deceased, which have, or shall come to the hands, possession or knowledge of the said A. B. or into the hands, or possession of any other person or persons, for the said A. B. and the same so made do exhibit, or cause to be exhibited, into the registry of the Prerogative Court, in the Secretary's office of this State, or to the Orphans' Court of the proper County, or to the Surrogate, as the case may require, at, or before the expiration of six calendar months, from the date of the above written obligation; and the same goods, chattels and credits, and all other goods, chattels and credits of the said deceased, at the time of death, which at any time after shall come to the hands, or possession of the said A. B. or into the hands or possession of any other person or persons, for the said A. B. do well and truly administer according to law; and further do make, or cause to be made, a just and true account of administration, within twelve calendar months, from the date of the above written obligation; and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the account of the said administration, the same being first examined and allowed by the Prerogative Court, or other competent authority, shall pay and deliver unto such person or persons, respectively, as is, are, or shall by law, be entitled to receive the same. And if it shall hereafter appear, that any last will and testament was made by the deceased, and the executor, or executors therein named, or any other person or persons, do exhibit the same into the said Prerogative Court, Orphans' Court, or Surrogate, as the case may be, making request to have it allowed and approved: if the said A. B. being thereunto required, do render and deliver the said letters of administration, (approbation of such testament being first had and made) to the said court; then the above obligation to be void, and of none effect, or else, to remain in full force and virtue."

2. The like bonds with conditions suited to the nature of the respective cases shall be given by administrators *durante minori ætate, durante absentia, pendente lite, cum testamento annexo,* or by whatever name or description they may be known or distinguished.

3. All administration bonds given in pursuance of this act, or in pursuance of any other act of the Legislature, shall be

good to all intents and purposes, and pleadable in any court of justice.

And in case any such bonds shall become forfeited, it shall and may be lawful, at the request and on the petition of any party aggrieved, to prosecute the same bond in the Prerogative Court, the Orphans' Court, or in any other court of record.

And the moneys received on such bond, shall be applied towards making good the damages sustained by the not performing the conditions of the said bond in such manner as the Ordinary in the Prerogative Court shall by sentence and decree direct.

SEC. VI. *And be it enacted by the authority aforesaid*, That—

1. Whensoever and so often as any testament, last will, or codicil, shall be admitted to proof before the Ordinary, the Orphans' Court, or the Surrogate of any county, as the case may be, the depositions, examinations, and evidence of the witnesses who shall have been examined thereto, as well in establishment of the said will, as in derogation and impeachment thereof, shall be carefully written down and endorsed on the back of the said will, or annexed thereto, and recorded.

2. The Ordinary, Orphans' Court, or Surrogate, as the case may be, when the will is sufficiently proved to their satisfaction, shall cause probate of the same will, testament, or codicil, to be made in the nature of a record. And the same probate shall be signed by the proper officer, dated and filed.

3. The probate of all last wills, testaments and codicils, shall be recorded in the office of the Register of the Prerogative Court, if they shall have been proved before the Ordinary.

4. All letters testamentary, issued by the Ordinary, shall be recorded by the Register of the Prerogative Court.

5. All letters of administration issued by the Ordinary, shall be recorded by the Register of the Prerogative Court.

6. The probate of all last wills, testaments, and codicils, proved either before the Surrogate, or in the Orphans' Courts, shall be recorded by the Surrogate.

7. All letters testamentary, issued and granted by the Surrogate, or the Orphans' Court, shall be recorded by the Surrogate.

8. All letters of administration, issued and granted by the

Surrogate, or the Orphans' Court, shall be recorded by the Surrogate.

9. Exemplification of probates, of letters testamentary, and of administration, shall be received in evidence in all courts of justice in this state.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

1. The executor and administrator of any testator or intestate, with the aid, and in the presence of at least two reputable disinterested freeholders, as appraisers, shall make, or cause to be made, a true and perfect inventory of all the goods, chattels, and credits, as well moveable, as not moveable, which were of the said testator, or intestate; and the same inventory, shall by the said executor, or administrator, be presented to the Ordinary, the Orphans' Court, or Surrogate, before whom the testament, last will, or codicil, shall have been proved; or from whence the administration was committed, upon the oath or affirmation of such executor, or administrator, that the same inventory is just and true; and, also, upon the oath, or affirmation of the said freeholders, or appraisers, or one of them, in whose presence the said inventory was made, and by whom the said goods, chattels, and credits were appraised, that the same were appraised according to their just values, after the best of his, and their, as the case may be, judgment and understanding. And in case but one appraiser shall be sworn or affirmed, then it shall be added, that the other appraiser, or appraisers, was or were present and consented in all things to the doing thereof.

2. All personal property whatsoever, included in the inventory and appraisement, shall be deemed assets in the hands of the executor and administrator, and shall be accounted for as such; unless the court before whom the account shall be taken, shall see just cause to decree to the contrary.

3. The aforesaid inventory shall extend to, and include:—First, leases for years; lands held by the deceased, from year to year, and estates held by him for the life of another, which shall not have been devised by him according to law: Second, the interest which may remain in the deceased, at the time of his death, in a term of years, after the expiration of any estate for years therein granted by him or any other person: Third, lands devised to an executor, for a term of years, for the pay-

ment of debts: Fourth, things annexed to the freehold, or to any building, which may be severed without prejudice: Fifth, things so annexed for the purpose of trade, or manufacture, and not so fixed in the wall of a house, as to be essential to its support: Sixth, the crops growing in the land of the deceased, at the time of his death: Seventh, every kind of produce, raised annually by labor, excepting grass growing, and fruit not gathered: Eighth, rent reserved to the deceased, which had accrued at the time of his death: Ninth, debts secured by mortgages, bonds, notes, or bills: accounts, money, and bank bills, or other circulating medium: things in action, and stock in any company, whether incorporated or not: Tenth, goods, wares, and merchandise, utensils, furniture, cattle, provisions, and every other species of personal property and effects—save only and except, such chattels, real and personal, as at the course of the common law, would descend to the heir *ratione soli*.

4. If any executor, or administrator, shall refuse, or neglect, to return such inventory as aforesaid, within six calendar months, from the time he shall receive, or have notice of the letters testamentary, or of administration to him issued; such executor, or administrator, shall be subject to attachment, imprisonment, and distress infinite, until he shall return such inventory.

5. If any executor, or administrator, being subject to attachment, imprisonment, or distress, for the cause aforesaid; or if any executor, or administrator, being attached, imprisoned, or distrained, for the cause aforesaid, shall refuse, or neglect to return such inventory, as aforesaid, for the further space of thirty days, it shall be in the discretion of the Ordinary, the Orphans' Court, or the Surrogate, before whom the matter shall be, by decree, and supersedeas thereon, either in term time, or in vacation, to revoke, and entirely annul, the letters of such executor, or administrator, so refusing, or neglecting, as aforesaid.

6. If the letters testamentary, or letters of administration, shall be revoked, as to all the executors, or administrators named in the said letters; then, new letters of administration, shall forthwith issue, in term time, or in vacation, to the persons thereto entitled, (other than such executor, or administrator so revoked, as aforesaid) by the order and decree of the

Ordinary, Orphans' Court, or Surrogate, before whom the matter may then be.

And if the said matter, or matters, or any of them, referred to in this act, or the preceding number of this section, shall be in the Orphans' Court of any county; it shall, and may be lawful for the Justice of the Supreme Court, who shall have held the last antecedent term of the Orphans' Court of the said county; or for some other justice of the Supreme Court, either within the said county, or without the same, to enquire into the matter, or matters aforesaid, and cause right to be done, according to the directions of this act.

7. If letters of administration, *de bonis non*, shall be issued, as are provided for in this act, they shall supersede all former letters, and shall deprive the former executor, or administrator, of all power, authority, and control, over the personal estate of the deceased; and shall entitle the administrator, *de bonis non*, to take, demand, and receive, all the goods and effects of the deceased, wheresoever the same may be found.

8. Whensoever and so often as, the letters to any executor, or administrator, shall be revoked, repealed, or annulled, or the authority of such executor, or administrator, shall from any cause cease, or be determined: he may be cited to account, at the instance of the co-executor, or co-executors, co-administrator, or co-administrators, administrators *de bonis non*, or other proper person; and such account may be enforced by attachment, imprisonment, and distress infinite.

9. In all cases of revocations of letters testamentary, or letters of administration, by the sentence, order, or decree of any court, or other competent jurisdiction, the bond, recognizance, or other security given by such former executor or administrator, may, by permission of the Ordinary, be prosecuted, and a recovery had thereon, to the full extent of any injury sustained by the estate of the deceased, by the acts, or omissions, of such executor, or administrator, and to the full value of all the property of the deceased, received and not duly administered, by such executor, or administrator: Provided, that the said recovery shall in no case exceed the penalty mentioned in the said bond, or the amount expressed and set forth in the said recognizance, or other security.

10. The moneys to be collected on such prosecution, after deducting the necessary expenses of such collection, shall and

may, on the petition of the administrator, *de bonis non*, be paid to him, and shall be deemed to be assets in his hands.

11. Any one or more of the executors, or administrators, named in any letters, may on the neglect of the others, return an inventory, and thereupon shall have the whole administration; unless the Ordinary, the Orphans' Court, or Surrogate, before whom the matter shall then be, shall for just cause, and on reasonable terms, restore the delinquent executor or administrator.

12. Whenever personal property, or assets of any kind, not mentioned in any inventory, that shall have been made, shall come to the possession, or knowledge of any executor, or administrator, he shall cause the same to be appraised in manner aforesaid; and an inventory thereof to be returned, within two months after the discovery thereof. And such inventory, and return, may be enforced in the same manner as the first inventory.

13. In all cases where administration shall be granted with the will or testament annexed, the will of the deceased, in such will or testament expressed, shall be observed and performed; and the administrators with such will annexed, shall have all the rights and powers, and be subject to the same duties, as if they had been named executors in such will.

14. The appointment of any person to be an executor, shall in no case be deemed a release, or extinguishment, of any debt or demand, which the testator may have had against him; but such debt or demand, shall be included in the inventory, and shall be subject to distribution like other personal estate.

15. The discharge or bequest in a will, of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid, as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand: And the amount thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies.

16. Legacies, if no time be limited for the payment thereof, shall, in all cases, be deemed due and payable, at the expiration of one year from the death of the testator.

Sec. VIII. *And be it enacted by the authority aforesaid*, That—

1. All powers, directions and authorities relating to real estate, contained in any last will, and not given to any person, by name or description, shall be deemed to have been given to the executors thereof.

2. The executors of the last will of any decedent, to whom is given thereby a naked authority only, to sell any real estate, shall take and hold the same interest therein; and have the same powers and authorities over such estate, for all purposes of sale and conveyance; and also, of remedy by entry, by action, or otherwise, as if the same had been devised to them to be sold: saving always, to every testator, his right to direct otherwise.

3. The survivors, and survivor, of several executors of any last will, containing a devise of real estate, to such executors, for the purpose of sale, or otherwise, or a power, or naked authority only, to them, to sell the same, as aforesaid; also the acting executor, or executors of any such will, where one or more of them resign, refuse, or renounce the trust, or are discharged, or dismissed therefrom, or are, or shall be superseded, shall have the same interest in, and power over such estate, for all the purposes of sale, conveyance, and remedy as aforesaid, as all the executors might have, or exercise, for the like purposes.

Administrators *cum testamento annexo*, and the survivors and survivor of them, shall in like cases, have the same interest in and power over such estate, for all the purposes of sale, conveyance and remedy as aforesaid.

Sec. IX. *And be it enacted by the authority aforesaid*, That—

1. Executors and administrators who shall receive their letters from the Ordinary, shall settle their accounts in the Prerogative Court.

2. Executors and administrators who shall receive their letters from the Surrogate, or the Orphans' Court, shall settle their accounts in the Surrogate's Court, or in the Orphans' Court, as they shall severally be required.

3. Proper allowances shall be made to executors and administrators, for property of the deceased, which may have perished, or been lost, without the fault, or neglect of such executors or administrators.

4. No profit to any executor, or administrator, shall be made by the increase; nor shall any loss be sustained by the decrease of any part of the estate, without the fault of such executor, or administrator: but every executor and administrator, shall return an account for such increase, and may be allowed for such decrease, on the settlement of his accounts.

5. Commissions to be allowed to executors and administrators on the final settlement of their accounts, shall not exceed the following rates, over and above their actual expenses, reasonably and necessarily incurred: First, for receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five per cent: Second, for receiving and paying out any sums, exceeding one thousand dollars, and not exceeding five thousand dollars, at the rate of two and a half per cent: Third, for receiving and paying out all sums, exceeding five thousand dollars, at the ratio of one per cent.

SEC. X. *And be it enacted by the authority aforesaid*, That—

1. Any executor, or administrator, after the expiration of eighteen calendar months, from the time of granting letters testamentary, or of administration of the same estate, may render a final account into the proper office, and by petition pray that the same may be examined, proved, allowed and passed, according to law.

2. And thereupon it shall be the duty of the Ordinary, Orphans' Court or Surrogate, as the case may be, to take order in the premises, according to right and justice, and make final decree therein.

SEC. XI. *And be it enacted by the authority aforesaid*, That—

1. To enable the executor or executors, administrator or administrators, to examine into the condition of the estate and ascertain the amount and value thereof, and the debts to be paid out of the same, no action at law, or in equity, shall be brought against any executor, or administrator, until after the expiration of six months, from the time of the death of the testator, or intestate, unless it be on the suggestion of fraud, or for the physician's bill during the last sickness, funeral charges and expenses, and any judgment, or judgments entered of record against such decedent in his life time and unsatisfied.

REMARKS UPON THE ACT

Concerning Executors and Administrators.

Section 1. The general object of this section, it will be perceived, is to place executors and administrators so far forth as respects their *rights* of sustaining actions, and of being *liable* to them, on the same footing.

1, 2, 3, and 4, ascertain and acknowledge these rights and liabilities, more specifically and distinctly than they are set forth in sections 1, 2, and 8, of the statute 2 March, 1795. and also with regard to actions of account.

5. At common law, no executor was answerable for a *devastavit* by his testator—The statutes 30, Car. 2. c. 7, and 4, and 5, W. and M. c. 24, created a liability. The third section of our statute before mentioned, incorporated within our law this excellent and remedial principle, and it is here preserved.

6, and 7, are taken from section 4, of the existing law, slightly varied for a reason very apparent.

8, and 9, appear to introduce a new principle into the law of executors and administrators: But it is rather the appearance than the reality. *Actio personalis moritur cum persona* is a maxim of the common law—Its truth is general, but not universal. Every day's history exhibits to us cases, where if the maxim were received, and strictly applied, it would work great injustice: and therefore with regard to many cases it exists only in name.

For injuries to real property no action in form *ex delicto*, can be supported against the personal representatives of a wrong-doer; and as a general remark, upon the death of the wrong-doer, the remedy for wrongs *ex delicto*, and unconnected with contract, determines. And therefore, in a variety of cases, the law has been at pains, to imagine and support a fictitious *contract*, in order that right may be done. Thus if trees be cut down and taken away, an imaginary sale may be resorted to; and if they shall have been sold by the wrong-doer, an assumpsit for money had and received, will be supported, by a reliance on other fictions.

The remedy is however very imperfect, often fails, and is by no means commensurate with the extent of the real complaint.

The aid of equity has often been invoked, in peculiar cases. The expense has become frightful, and the sufferer has at last been obliged to submit, from the conviction that the remedy is worse than the disease.

It is difficult to conceive of any reason in the nature of things why injuries to real property, in the character of torts, should not be redressed in their very names, and according to the very truth of the matter.

The states of New-York and Pennsylvania, have adopted the principle here recommended *in extenso.*

10. Is in conformity with the 9th section of our statute, omitting the preamble, which is esteemed entirely unnecessary.

Sec. II. 1. Is a transcript of the 6th section of our statute.

2, 3, and 4, are intended to prevent the abatement of suits, by or against executors and administrators, by the death of any, or all, of the plaintiffs, or defendants, in the cases there mentioned.

The propriety of these provisions, is, I believe, admitted on all hands; and this seems to be the most suitable place for their insertion.

5. The reason of this is obvious.

Sec. III. 1, 2 and 3 are conformable to the existing Statute, *and the course of practice and adjudications thereon.*

4. Is nearly a transcript of the 18th Section of the act making lands liable to be sold for the payment of debts, R L. 434. It is respectfully suggested, that this is the more convenient and proper place for it.

5. Is copied from the 5th Section of the *Act for the more speedy recovery of Legacies,* &c. passed 11th March, 1774, and is I think, one of the very few provisions of that act, which ought to be retained in the Statute Book.

6. Is extracted from the 14th Section of the Statute of Frauds, and is supposed to belong more appropriately to the subjects treated of in this Bill.

Sec. IV. 1. and 2. The order in which the relatives of a decedent, are, *in general,* entitled to administration, as here set down, is rather the result of judicial decision, than from any positive enactment. Inasmuch, however, as a discretion is given to the Ordinary, Orphans' Courts, and Surrogates, to sus-

pend, and finally to reject such as are incompetent; and as it is further incumbent on these tribunals, absolutely to exclude *certain other* of the relatives; it seems proper for the purpose of avoiding unnecessary controversies, and for the removal of doubts, to prescribe some order by public statute.

8. That the husband as such, *if not otherwise disqualified*, should be solely entitled to administration upon the effects of his deceased wife, is, I believe, universally conceded; and has always been the law in New-Jersey. The *presumption* set forth in this number is all that is new.

By the marriage, the personal property of the wife, in *possession*, becomes actually the husband's; but with regard to her personal property in *action*, such as bonds, notes, contracts, and her right to recover damages for injuries, &c. his right is not so extensive. True, he may dispose of her choses in action, at his pleasure; he may sue and collect them in his own name, together with the name of his wife; and when collected, the avails are absolutely his—But if he do not dispose of them *during coverture*, he cannot dispose of them at all: and if he die, not having disposed of them, they will go to the wife, if she be living; and if she be dead, then to her personal representatives. Hence it becomes necessary for him to take out letters of administration.

By the marriage the husband also becomes liable to pay the debts of the wife: *Provided, these debts be collected during the coverture:* For when the coverture is at an end, his liability in this respect is likewise at an end.

It is wholly immaterial, whether he acquired property, or not, by the marriage. His liability does not depend in the smallest degree, upon his having received property with his wife. If he have received a large estate with her, he is answerable for no debt, which is not collected during coverture. On the other hand, if he have received no property with her, he is liable for all her debts, sued for, and collected during coverture.

If the wife have not at the time of her death any choses in action, or real estate, her creditor has lost his debt.

It follows therefore, that the husband is liable for her debts, after her death, only as her administrator. If there be property and debts of the wife, he ought to be made responsible for

what he receives; and if he will not take out letters of administration, to protect himself, he ought to be presumed to have assets.

Whether the assets of the wife in the hands of the husband's executor are, or are not, liable for the husband's debts is *questio vexata* Co. Lit. 351 in notis. This surely ought to be settled.

4. Requires no comment.

5. It is a harsh rule of the common law, which declares that the Ordinary, cannot refuse letters testamentary to an executor, because he is *incapax*, nor compel him to give security; but such is the rule, 1 Show. 293, 1 Salk. 298, 12 Mod. 9, 1 Ld. Raym. 561. It is presumed that the Legislature will correct this intolerable evil.

6, 7, 8, 9, 10, and 11, Require no comments—Their expediency and their justice must be apparent.

Section V. The whole of this section is taken from the existing law, and such slight alterations are made as the nature of the proposed system requires.

Section VI. The probate of a will is in the nature of a judicial act. It is the judgment of law, that the instrument offered for proof, is the last will of the deceased; and therefore must, in the nature of things, be a conclusion flowing out of antecedent premises. There must be something then to support the sentence or decree. It cannot be independent. It cannot be arbitrary. At law the judgment is not *consideratum est*, but *ideo consideratum est*. There has been great confusion and inaccuracy in the law language of this state, in the use of the words *probate* and *letters testamentary*, ever since the passing of the act relative to the probate of wills, granting letters of administration and guardianship, 9th Nov. 1803, and commonly called Bloomfield's Law.

It is now conceded that that act was very unskilfully drawn, and has been the parent of much mischief.

Since that period, the two words before mentioned, have been strangely used in our statutes and law proceedings—sometimes as synonimous, and sometimes as in contrast. In strictness of language, there is not to be found a single probate in this state, since the date of that statute.

The object of this section is to restore the probate to its proper place.

It may be perfectly proper to *prove the will;* and yet to refuse letters testamentary to an incompetent person named therein as executor.

Section VII. 1. This is taken from our statute R. L. 176.

2. In like manner.

3. I wish I could say, that this is in conformity with the existing law; but the decisions of courts have been far from uniform on this subject. Toller 199 and the cases there cited. It seems necessary that the Legislature should decide the points of controversy.

4, 5, 6, and 7. Do no more than to vest in the courts therein named such powers and authorities, as are necessary to carry into effect the great objects of the bill.

The remaining numbers of this section require no comment.

Section VIII. 1. The general principle set forth in this number, provides for a numerous class of cases, where a testator in his will, shall have directed his real estate, or part of it, to be sold, without naming, or directing who should sell the same. In these cases, and the like, equity is frequently appealed to at great expense and trouble. The enactment of a general governing principle, it is believed, will be salutary.

2 and 3 Are derived substantially from our statutes. R. L. 226. Sect. 9, and R. L. 573, Sec. 1.

Whether such sales, or the exercise of such authority, ought to be under the supervision and control of any court, or not, I have not presumed to judge. The question is highly important, and is left to the wisdom of the Legislature.

4. The command in the statute, that the administrator *cum testamento annexo*, shall observe and execute the expressed will of the testator, seems to render it necessary, that he shall be clothed with power to perform his duty.

The same question, as in 2 and 3, is presented here.

Sec. IX 1 and 2 Are directory upon executors and administrators to settle their accounts in the proper courts.

3 and 4 Require no comment. They are according to the acknowledged rules of equity; and it is difficult to conceive of any objection to them.

5. Relates to commissions to be allowed to executors and administrators.

Whether these should be governed by some certain rate established by public law, or whether they should be left to the

sound discretion and intelligence of the court, before whom the account is to be taken, and who are required to judge of the matter from the particular circumstances of each case, is an important inquiry.

I did not intend to express an opinion that a certain rate ought to be established: far less did I undertake to judge, what rate ought to be. It was put down arbitrarily, and in place of a blank, and was printed through mistake. I am by no means certain that it was the proper allowance.

Section X. Relates to voluntary settlement of accounts by executors and administrators, and requires no comment.

Sec. XI. Is extracted from the statute, 12th June, 1820, R. L. 766, section 2.

AN ACT

Concerning the Descent and Distribution of the Estates of Intestates.

Section I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

The real estate of a decedent which shall not have been sold, or disposed of by will, or otherwise limited, by marriage settlement: together with the surplus of the personal estate of the same decedent, which in like manner shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, and which shall remain after payment of debts, shall be divided and enjoyed as follows:

1. When such intestate shall leave a widow and issue, the widow shall be entitled to one third part of the real estate for the term of her life, and to one third part of the said surplus of the personal estate absolutely.

2. Where such intestate shall leave a widow and collateral heirs, or other kindred, but no issue, the widow shall be entitled to one half part of the real estate, including the mansion house and buildings appurtenant thereto, for the term of her life, and one half of the said surplus of the personal estate, absolutely.

3. Where a widow shall elect to take, under the provisions of this act, the same shall be *adjudged* to her in *lieu and full satisfaction of her dower.*

4. Reasonable time shall be given to the widow, by the order, or decree of the Prerogative Court, or the Orphans' Court, as the case may be, to elect between her dower, and the estate and portion given to her by this act.

5. Where such intestate shall leave a husband, he shall take the whole surplus of the personal estate; and the real estate shall descend and pass as herein after it is *provided:* saving to the husband his right and estate therein, as tenant by the courtesy, which shall take place whether there be or be not issue of the marriage, and whether the issue, if any could have inherited or could have not inherited.

SEC. II. *And be it enacted by the authority aforesaid,* That—

Subject to the estates and interests herein before given to the widow, or surviving husband, if any, the real estate of such intestate shall descend to, and the personal estate, not otherwise herein before disposed of shall be distributed among his issue, according to the following rules and order of succession:

1. If such intestate shall leave children, but no other direct lineal descendants, the said real and personal estate shall descend to, and be distributed among, such children, in equal parts.

2. If such intestate shall leave children and other lineal descendants, the said real and personal estate shall descend to, and be distributed among, such children, and such other lineal descendants in such manner that each child who shall be living shall inherit and take such share and portion as would have descended to him, or have been distributed to him, if all the children of the intestate who shall have died leaving direct lineal descendants, had been living; and so also, that the descendants of each child who shall be dead, shall inherit the same real estate, and have distributed to them the same personal estate, which their parent would have taken, or received, if living.

3. If such intestate shall leave no children, but other lineal descendants, the said real and personal estate shall descend to, and be distributed among, such other lineal descendants, in such manner as that the issue of the descendants who shall

have died, shall respectively take the same shares and portions, which their parents, if living, would have received.

4. In every case, the issue of a deceased child, grand child, or other descendant, shall take by representation of their parents respectively, and shall take such share and portion as would have descended, or been distributed, to such parents if they had been living at the death of the intestate.

5. If such intestate shall die without lawful descendants, the said real and personal estate shall go to, and be vested in, the father and mother of such intestate, absolutely; or, if either father or mother be dead, at the time of the death of the intestate, then the parent surviving such intestate, shall hold and enjoy such real and personal estate absolutely, or for such estate and interest therein as the intestate had in the same.

SEC. III. *And be it enacted by the authority aforesaid*, That—

In default of issue, father and mother as aforesaid, and subject also to the estates and interests herein before given, the real estates shall descend to, and the personal estate not otherwise herein before disposed of, shall be distributed among, the collateral heirs and kindred of such intestate, according to the following rules and order of succession:

1. If such intestate shall leave brothers and sisters, or either, of the whole blood, and no nephew or niece being the issue of a brother or sister of the whole blood, the same real and personal estate as aforesaid, shall descend to, and be distributed among, such brothers and sisters in equal parts.

2. If such intestate shall leave brothers and sisters, or either of the whole blood, and also nephews or nieces, being the children of such deceased brother or sister, the real and personal estate aforesaid shall descend to, and be distributed among such brothers and sisters, and nephews and nieces, in such manner as that every such brother or sister, shall receive and have such share and portion, as he, or she would have received, or had, if all the brothers and sisters who shall then be dead, leaving children, had been living at the time of the death of the intestate. And such nephews and nieces, shall take by representation of their parents respectively, such share only as would have descended upon, or been distributed to, such parents, if they had been living at the time of the death of the intestate.

3. If such intestate shall die without leaving any brother or sister, of the whole blood, but shall leave nephews or nieces, or either, being the children of such deceased brother or sister, the real and personal estate aforesaid, shall descend to, and be distributed among, such nephews and nieces, in such manner that such nephews and nieces shall take by representation of their parents respectively, such share and portion only, as would have descended upon, and been distributed to, such parents, if they had been living at the time of the death of the intestate.

4. If such intestate shall leave neither brother nor sister, of the whole blood, nor any nephew or niece, being the child of any such deceased brother or sister, the real and personal estate aforesaid, shall descend to, and be distributed among, the next of kin of such intestate, but without distinction of blood: Provided, that there shall be no representation admitted among collaterals, after brother's and sister's children.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. In default of known heirs or kindred of the intestate, competent to take the estate, the said real and personal estate shall be vested in the widow; or if such intestate shall have been a married woman, then in her surviving husband, for such estate as the intestate had therein.

2. In default of all known heirs or kindred, widow or surviving husband, as aforesaid, the real and personal estate of such intestate shall escheat to this state.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. Whenever there shall be but one person entitled to inherit, according to the provisions of this act, he shall take and hold the inheritance solely; and whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall take and hold the same as tenants in common, in proportion to their respective right.

2. Descendants and relations of the intestate, begotten before his death, but born thereafter, shall in all cases inherit, hold, and take the estate, real as well as personal, in like manner as if they had been born in the life time of such intestate.

3. The provisions of this act, relative to the descent and distribution of real and personal estate to and among the descendants, or collateral relations of an intestate, as the case

may be, shall be construed to mean such persons only, as shall or may have been born in lawful wedlock, or within a competent time thereafter.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. If any child of an intestate, shall have any estate by settlement of such intestate, or shall have been advanced by him in his life time, in either real or personal estate, or both, to an amount in value equal to the share which shall be allotted to each of the other children of such intestate, such child shall have no share of the real and personal estate of such intestate; and if such settlement or advancement, be to an amount or value less than the share to which he would otherwise be entitled, if no such advancement had been made, then so much only of the real and personal estate of such intestate shall be allotted to such child, as shall make the estate of the said children to be equal, as near as can be estimated.

2. The value of any real or personal estate so advanced shall be deemed to be that which was acknowledged by the child, by an instrument of writing, if any there be; otherwise, such value shall be estimated according to the worth of the property when given.

3. The maintaining, or educating, or giving of money to a child, without a view to a portion, or settlement in life, shall not be deemed an advancement within the meaning of this act.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

1. All such of the intestate's collateral heirs and relatives, and persons concerned, who shall not lay legal claim to their respective shares within seven years after the decease of the intestate, shall be debarred from the same forever:

2. *Provided*, that the time during which the said relative, or other person shall be an infant, *feme covert*, or *non compos mentis*, shall not be taken or computed as a part of the said limited period of seven years.

Sec. VIII. *And be it enacted by the authority aforesaid*, That—

Nothing in this act contained relative to the distribution of personal estate among kindred, shall be construed to extend to the personal estate of any intestate, whose domicil, at the time of his death, is, or shall be out of this state.

REMARKS UPON THE BILL

Entitled "An Act concerning the Descent and Distribution of the estates of Intestates."

I have approached this subject with great diffidence and intense solicitude. The peace and order of society demand that the property of the intestate be distributed by certain and by equitable rules.

I am aware of the profound learning, untiring industry, and legal *acumen* of that distinguished civilian, to whom the statute of descents, 20th January 1817, is ascribed. It acknowledges the hand of a master, "a scholar and a ripe and good one." But experience has shewn to us that there is an intrinsic difficulty, if not impossibility, in executing some at least of its provisions. It is also, and was intended to be, confined in its operation to the descent of real estates, without at all interfering with the distribution of the personalty.

Descent and *distribution*, for a long time after the revolution, were on very different principles—the real estate seeking one direction, and the personal being commanded to go in another. The broad principle of equality assumed and established in the transmission of real and personal estate, qualified by the rule of representation, after the first descent, has in modern times, and in many instances, broken down the wall of partition. Why this should not be universal, and the law of distribution should not in *all instances* be accommodated to the law of descents, I confess I am at a loss to answer.

I have been advised by some very discreet and intelligent friends, to draw a bill, that shall embrace both species of property: so that one construction being given to the bill altogether, the respective shares of those, who are to succeed, may be distinctly understood from fair and faithful computation of the whole of an estate as an entirety.

Section I. This section is divided into five numbers.

1. Provides for the widow, in case there be a widow, and issue, and is exactly commensurate with her rights under the existing laws.

2. Provides for her more liberally, so far as respects the real estate, where the intestate leaves no issue, and the estate must go to collaterals. The alteration from the existing law is merely in respect of the realty. I have been induced to introduce this provision from the expressed desire and conversation of several members of the legislature; and from the strong and decided opinion of some highly valued professional friends. It is scarcely necessary to add, that my own judgment, and my feelings entirely concur.

3. Follows as a necessary consequence; and it cannot but be perfectly proper that the foregoing allowance, shall be *adjudged in lieu of dower.*

4. Is intended to protect the ignorant, from losing their *election* by lapse of time; and therefore requires *notice* and *decree.* Great hardships are known to have been suffered by widows from ignorance of their rights, until after the day of election was passed and gone.

5. Is an alteration of the law on the subject of *courtesy.* The estate in dower requires *marriage, seizen* of an estate of inheritance, and death of the baron. And the seizin by the common law is required to be of *such* an estate of inheritance, as any issue which she might have had, could by possibility have inherited. Our statute R. L. 397, whether designedly or not I do not know, does not require *such* estate. To create an estate by the courtesy, the common law requires four things: *marriage, seizin, issue* born alive during the life of the wife, and *death* of the wife: and the *issue* required is such as is capable of inheriting her estate.

The most enlightened jurists of this day concur in condemning a rule "which makes the estate of the husband dependent upon the circumstance of issue being born alive capable of inheriting," and that there is no sufficient or reasonable foundation for it in our state of society and government. It is a part of the feudal system and "receives no support from analogies in our own, or other codes of jurisprudence." The proposed alteration will have the effect of lessening the amount of litigation; by removing questions, which have sometimes occurred respecting the birth of issue, and, whether such issue were or were not born alive.

Section II. This section is also divided into five numbers.

1. 2, 3 and 4. Are in conformity with the existing law. Some attention has been bestowed on the subject so as to express the propositions plainly and distinctly. *Equality of rights among the first class of descendants*, and *representation* afterwards, seem to be received as cardinal principles in our system. They are here faithfully preserved.

5. Provides for the case where there is no child, grand child or other lineal descendant.

It is respectfully suggested to the Legislature, that the principle of the common law, which sternly commands, that inheritances shall lineally descend, *but shall never lineally ascend*, is absurd, when applied to our jurisprudence and system of government. It is another remnant of feudal tenures, applicable to cases of military service to be rendered to a feudal lord. In our statute of the 20th January 1817, the Legislature abolished the rule, so far forth as to allow the father to succeed in certain cases; but not so as to the mother. How it so happened, or what is the cause of the distinction, it is difficult, perhaps impossible to say.

A case was not long since brought before the Court, wherein an only son of a widow died intestate. He left a very considerable real estate. She had lived with him upon the estate until the time of his death. It was adjudged to a remote and unknown cousin, who was his heir by the common law. The sympathy of her neighbors and friends was all that was left to the distressed and impoverished widow.

This number provides in default of all descendants for a joint estate in the father and mother, and that the survivor of them shall have it absolutely.

Section III. Provides for the succession of collaterals in default of issue and of parents.

1. Provides for brothers and sisters of the whole blood to take in equal parts.

2. Brothers and sisters of the whole blood, to take in their own right and the issue of deceased brothers and sisters to take *jure representationis*.

3. Nephews and nieces being children of brothers and sisters of the whole blood, to take *jure representationis*.

4. If neither brother, nor sister, nor nephew, nor niece, being the child of a deceased brother or sister of the whole blood,

the estate to go to the next of kin to the intestate without distinction of blood.

Section IV. Provides for contingencies possible, but not likely to happen.

Section V. 1. Is in conformity with our statute.

2. Is so obviously just as to require no comments.

3. The principle set forth in this number is to be found in the statute book of every state in the union, but one. In that one there is a provision for the *illegitimates who shall have been acknowledged* in default of issue and parents, and that they shall come in and take before collaterals.

Section VI. By our present statutes of distribution and descent, it may easily happen, and in point of fact it often has occurred, that one child has been largely advanced in personalty, even to the amount and more than the amount of his share of the real and personal estate put together. Such advancement by a strict construction of our act, cannot be charged against his share of the realty, but he must receive his equal proportion thereof, as though he stood on even ground with his brothers and sisters, who have received no such advancement.

This is an evil which the Legislature alone has power to correct. The subject is before them.

1. Is intended to prescribe a rule by which the amount, or value of the advancement is to be charged against the entire share real and personal, of the child so advanced; and that he shall receive no more than the just balance.

2. Has not heretofore been inserted in the statute book, but is in conformity with all respectable authorities.

3. Contains a negative, the result of judicial decisions.

Section VII. Is a statute of limitation with respect to collateral heirs and relatives of the intestate.

Some such provision seems absolutely essential. The great difficulty is to ascertain the just and proper exceptions—statutes of limitation have been justly described as "acts of peace and harmony for society." *Interest reipublicæ ut sit finis litium.*

Section VIII. Requires no comment.

AN ACT

For the more just and equal distribution of the estates of deceased Insolvents.

SECTION I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

The estate real and personal of every deceased testator, or intestate, when insufficient to pay all his just debts, shall under the decree of the Prerogative Court of this State, or under the decree of the Orphans' Court of the proper county, be applied to the payment of his just debts in the following order :

1. To the payment of the funeral charges and expenses incurred on account of the said deceased :

2. To the extinguishment and satisfaction of all such liens, judgments, decrees and recognizances entered of record against the deceased, in his life time and remaining unsatisfied, as shall be actual incumbrances on the real estate of the deceased, according to the extent and priority of such incumbrances respectively :

3. To the payment of debts due to the United States, or to persons entitled to a preference under the laws of the United States :

4. To the payment of rents accruing upon leases, which shall have come to the hands, or possession of the executor, or administrator :

5. To the payment of the physician's bill against the deceased, for medicines and medical services during his last sickness:

6. The proceeds of the residue of the estate real and personal of such deceased testator, or intestate, shall be distributed among his other creditors, in proportion to the sums that shall be due to them respectively, and without preference.

SEC. II. *And be it enacted by the authority aforesaid,* That—

For the purpose of carrying into effect the foregoing provisions of this act,

1. Whenever any executor, or administrator shall discover, or have reason to believe, that the estate real and personal of

his testator, or intestate, is insufficient to pay all his just debts it shall be the duty of such executor, or administrator, as soon as conveniently may be, to present to the Prerogative Court of this state, if he shall have received his letters from the Ordinary, or to the Orphans' Court of the proper county, if he shall have received his letters from that Court, or from the Surrogate, as the case may be, a petition on oath, or affirmation, setting forth therein the amount and value of the estate of the deceased, as nearly as he can estimate the same, and also setting forth the amount of the debts of the deceased, as far as he can ascertain the same, and in the said petition pray the aid and advice of the said Court in the premises.

2. The Court shall thereupon by rule, refer the petition to one of the Masters, to enquire into the truth of the matters set forth therein, and to make full and true report with all convenient speed.

3. The Master shall require all the creditors of the deceased, to exhibit to him at convenient times and places by him to be appointed, their several and respective claims, whether the same shall be then payable, or to become payable; and that the said claims be verified by oath, or affirmation, or otherwise, if he shall so direct.

4. The Court shall limit a time, or times, and the same in just discretion may extend; and again limit, within which creditors shall exhibit to the Master their claims or demands against the estate of the deceased; or in default thereof be forever barred of their action therefor against the executor or administrator.

5. All creditors who shall refuse, or neglect to exhibit to the Master their claims, or demands against the estate of the deceased, properly verified as shall be directed, within the time, or times so limited, shall be by the decree and order of the Court forever barred of their action therefor, and shall receive no portion, or share of the estate of the said deceased.

6. Such public notice shall be given to creditors, to exhibit their aforesaid claims and demands to the Master, as the Court under the circumstances of the case, shall think reasonable and just.

7. The executor or administrator may in such manner, as the rules of the respective Courts shall point out, except against the demand, or claim of any creditor exhibited as aforesaid, or

any part thereof, and pray that the same be not allowed by the Master.

8. Any creditor, or other person interested, or other proper person, may in like manner except against the demand, or claim of any other creditor, or pretended creditor exhibited as aforesaid, or any part thereof, and pray that the same be not allowed by the Master.

9. Any creditor, or other person interested, or other proper person, may in like manner except against the account and exhibition of the executor, or administrator, in respect of the amount and value of the estate real and personal of the said testator or intestate, or in respect of any account, or claim which the said executor, or administrator may have exhibited against the estate of the testator, or intestate, and may pray that the same be corrected and amended according to truth and right.

Sec. III. *And be it enacted by the authority aforesaid*, That—

1. The Master shall have full power and authority to cause to come before him all parties and witnesses, at convenient times and places by him to be appointed; and them, or any of them to examine on oath, or affirmation touching and concerning all, or any of the matters so referred to him; or all, or any of the claims, or demands so exhibited to him; or all, or any of the exceptions so to be made as aforesaid; or touching and concerning any other matter, or thing in any wise there in controversy before him.

2. The Master may issue compulsory process to bring before him, at all such times and places, as in his discretion shall seem meet, parties, witnesses and papers; and the same process shall be served by all executive officers of the proper county, to whom the same shall come and be directed and delivered.

3. The Master shall reduce all examinations taken before him to writing, and cause the same to be signed by the examinants respectively.

4. He shall fully inquire into the very truth of the matters, and hear and determine the same.

5. He shall allow all just debts, demands and claims of the applying creditors, against the estate of the deceased, whether

the same shall be then payable, or to become payable, making proper rebate of interest on such as are to become payable, in cases where according to equity such rebate ought to be made.

6. He shall reject all false, fraudulent, fictitious and feigned claims and demands, and such as are not proved to his satisfaction.

7. He shall ascertain by the testimony of the executor, or administrator, and of others, the amount and value of the estate real and personal of the testator, or intestate; and shall correct and amend all errors, mistakes, mischarges, and improper credits in the account and exhibition of the executor or administrator.

8. And he shall make a full and specific report of all his doings in the premises, according to the rules and practice of the Court; and shall annex to the said report all the evidence taken before him, relative to the same.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. Upon the coming in of the said report, proper and convenient time shall be given for filing exceptions to the same.

2. If exceptions be filed, they shall be examined by the Court on equitable terms, and just decision had thereon according to right.

3. On reasonable terms, but at the sole costs, charges and expense of the party applying, additional evidence may be admitted on the examination of the exceptions.

4. If no exceptions be filed, or if the exceptions be overruled, the report shall be confirmed, and decree pass thereon, as of right it ought to be.

5. If the Master shall report that the estate of the deceased is insolvent, and the report shall be confirmed, then the Court shall require the said executor, or administrator to become bound to this state, with at least one sufficient freehold surety by recognizance in such sum, as the Court shall direct and appoint, not less than twice the value of all the lands, tenements, hereditaments and real estate, whereof the testator, or intestate died seized, or entitled unto: upon condition that if the said executor, or administrator, shall faithfully and fairly sell the said lands, tenements, hereditaments and real estate; and faithfully and fairly apply the just proceeds of the said sales, in a course of administration; and shall faithfully and

fairly account to and before the said Court for the same when thereto required ; and shall faithfully and fairly obey all such orders, or decrees, as the said Court, or other competent jurisdiction shall make of and concerning the premises, or any of them, then the said recognizance shall become void, otherwise of effect.

6. And then after the said recognizance shall have been entered into as aforesaid, and not before, the Court shall order, adjudge and decree, that the said executor or administrator shall make sale of the whole of the lands, tenements, hereditaments and real estate, whereof the testator, or intestate died seized, or entitled unto.

7. The executor, or administrator, who may be ordered under the provisions of this act, to sell any lands, tenements, hereditaments, or real estate, whereof any testator, or intestate died seized, or entitled unto, shall give such public notice of the time and place of sale, as the Court making the order shall direct :

8. And shall sell the said lands, tenements, hereditaments and real estate agreeably to the order of the said Court, at public vendue and outcry for the most and best price, which he can get for the same :

9. And shall make a deed of conveyance and assurance of the said lands, tenements, hereditaments and real estate to the purchaser thereof :

10. And the said decree, sale and deed, shall vest in the purchaser, as good and perfect an estate in the premises therein mentioned, as the testator, or intestate was seized of, or entitled unto at the time of his death ; saving only the right of dower to his widow, which shall not thereby be barred :

11. And the moneys arising from such sale of lands, tenements, hereditaments and real estate whereof the said testator, or intestate died seized, or entitled unto, shall be received by the said executor, or administrator, and shall be considered as assets in his hands, and shall be distributed among the creditors of the said testator, or intestate, according to the directions set forth in the decree of the Court :

12. And the said executor, or administrator, shall make report of all his doings in the premises, according to the rules and practice of the Court.

13. Upon the coming in of the report of the said executor, or administrator, and the same being shewn to be true, and it appearing to the Court how much money is in the hands of the executor, or administrator, to be distributed, the Court shall make a final decree, and therein shall ascertain and specify the several creditors of the said testator, or intestate, to whom distribution is to be made, and the sums due to them respectively, at the date of the Master's report; and shall ascertain and specify the amount to be distributed, after making the proper deduction for so much as ought reasonably to be allowed for the costs, charges and expenses, together also with so much as ought reasonably to be allowed to the executor, or administrator for his commissions: and shall ascertain and specify the amount to be paid to each creditor; and shall order, adjudge and decree that the executor, or administrator, as the case may be, do pay on or before a certain day, to be appointed in the said decree, to the said several creditors, the amount so ascertained and specified to be paid to each of them respectively: and shall bar all other creditors from any distributive share, or portion of the said estate.

14. If it shall so happen that the executor, or administrator, being required to enter into the recognizance, with sufficient freehold security prescribed by this act, shall neglect, or refuse to enter into the same, within the time mentioned in the order, or rule of Court for that purpose, the Court shall proceed to take order to revoke and annul the letters testamentary, or letters of administration of such executor, or administrator, and shall remove him from his said office and trust; and shall cause him to account at such short day as the Court shall appoint, for all assets in his hands, to the end that the same may be delivered without delay, to such person as the Court shall appoint for that purpose. And the Court shall further decree a judicial sale of the said lands, tenements, hereditaments and real estate, and that one of the Masters of the Court shall make the said sale, and the proceeds of the said sales shall be brought into Court, to abide such equitable order, or decree thereon as shall be made by the Court, in conformity with the provisions and principles of this act.

15. All sales of real estate, to be made by any of the Masters of the said Courts, by virtue of any rule, or order of any of the said Courts, and in conformity with the provisions and

principles of this act, shall be valid and effectual; and shall vest in the purchasers as good and perfect an estate in the premises as the testator, or intestate was seized of, or entitled unto, at the time of his death; saving only the right of dower to his widow, which shall not thereby be barred.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. If any action, or suit shall be pending against the executor, or administrator, for any debt, claim, or demand against his testator, or intestate, in any Court of law or equity of this State, at the time of the presenting of the said petition mentioned in the second section of this act, the proceeding in such suit shall be immediately suspended, and shall be no further prosecuted, until the said petition shall have been dismissed; and the debt, claim, or demand, shall be examined and decided upon as in this act is directed, and not otherwise: and the same shall be allowed, if according to equity it ought to be allowed, together also with such further sum, as may be reasonably taxed for the costs in the said suit, if costs ought to be allowed.

2. No suit shall be commenced, or prosecuted against any executor, or administrator, for any debt, demand, or claim against his testator, or intestate after the filing of the said petition, and due notice thereof.

3. If it shall so happen, that the proceeds of the estate real and personal of the testator, or intestate, shall produce more than sufficient to pay off and satisfy all the creditors to whom distribution is ordered to be made, together also, with such sum, or sums, as shall be assessed for the costs, charges and expenses, then it shall be lawful for such other creditors, as shall have been barred, by reason of not exhibiting their claims and demands to the Master as aforesaid, to present a petition to the Court for relief, in respect of such claims and demands, and proper relief shall be given in whole, or in part, as to truth and equity shall seem meet.

4. If it shall so happen, that the proceeds of the estate real and personal of the said testator, or intestate, shall produce more than sufficient to pay off and satisfy all the creditors of the said testators, or intestate, together also, with such sum, or sums, as shall be assessed for the costs, charges and expenses, then the residue and surplus shall go to and be divided among

the heirs, devisees, legatees, next of kin, or other persons thereto by law entitled, as the case may be.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. From any sentence, order, or decree, to be entered in any Orphans' Court, by virtue of this act, any party aggrieved may appeal to the Prerogative Court: Provided that the petition of appeal be presented within twenty days after the making of the said decree, but no appeal shall be taken thereafter.

2. All sentences, orders, judgments and decrees to be made and given in the Prerogative Court of this state, whether the same be of original, or appellate jurisdiction, shall be conclusive and final; and no appeal shall be allowed therefrom.

Sec. VII. *And be it enacted by the authority aforesaid*, That—

The Prerogative Court of this state, and the Orphans' Courts of the several counties of this state respectively, shall have full power and authority, to award and issue final process upon the several and respective orders, judgments, sentences and decrees, before them respectively remaining, and to compel obedience to their decrees, sentences and orders respectively by attachment, injunction, *ne exeat*, execution against body, execution against goods and lands, or all of them, or by other proper remedial writ to be devised, by the said Courts, or any of them, in legal discretion.

REMARKS UPON THE BILL

Entitled "An Act for the more just and equal distribution of the estates of deceased Insolvents."

This bill is intended to supply the place of the act concerning the estates of persons who die insolvent, passed 12th June, 1820.

The just and equal distribution of estates of deceased insolvents among their creditors, has from early day been much desired by the Legislature of New-Jersey. It is an important subject, and has at several times engaged their attention.

In May, or June, 1799, the late Judge Patterson reported a bill on the subject, which with some alteration was passed into a law on the 13th day of the latter month. Pat. 435.

This was altogether general in its character, and did not prescribe the manner of carrying its provisions into effect, but left *that* to the ordinary operations of law. Unforeseen difficulties arose, and in many instances, the just purposes of the law were marred, or defeated.—An effort at amendment was made in 1808, and renewed in 1809: but the act of the latter date was very imperfect and short-lived. The substitute of 1813 was an entire failure. On the 12th June, 1820, the statute was enacted, which is now the subject of consideration.

However we may approve in general of the principles upon which it is founded; it is impossible not to see, that in its details, there is great insecurity to the creditors, and a difficulty almost insurmountable in the effort to compel an obstinate, or an artful executor, or administrator faithfully to account. It is easily to be understood, that there will be severe struggles for preference in the cases of insolvent estates, and it cannot surprise us to discover, that the means of contest are not *too scrupulously* regarded.

The questions whether the claim of creditors *have been presented?* whether within the *times limited?* whether *properly* verified? have become prolific sources of litigation and dispute. These matters, together with the more important ones of the settlement of controverted claims among creditors, and the examination of the *account* and exhibit of the executor, or administrator, and a variety of other matters necessarily and closely connected, are according to the directions of the statute, so jumbled together, that it is scarcely possible to reduce this chaos to order and regularity. That there is also a defect in the coercive power, is too manifest to be doubted. Experience has proved, that vain and futile are the best and most faithful efforts of the judge, unless he may resort to coercive power. The *vindicatory* part of a statute, sometimes called its *sanction*, must always be its most effectual part. It is its life blood.

It had become necessary to revise the whole subject; and the bill reported is respectfully suggested as a substitute.

This bill endeavors to provide a remedy for the obvious defects in the existing law, to be more explicit in its terms and provisions, and is divided into seven sections.

Section 1. Declares generally, that the estate real and personal of a deceased insolvent, shall under the decree of that Court, before which the executor, or administrator is by law

bound to account, be applied to the payment of his just debts in a certain specified order.

It is not conceived necessary, or useful in express terms, to enact that its provisions shall extend to cases, which may have occurred antecedent to the passing of the act. All rights which have been acquired by prior laws, and are therefore *vested*, must remain. Just legislation is in its nature and principle prospective.

1. Has been preserved in all our statutes upon this subject, and seems to comport with the general understanding of all mankind.

2. *So far as regards the real estate*, this number is nothing more than the recognition of *liens* and incumbrances thereon previously made and existing, and which to *such extent* would have operation without this bill. It will be perceived that I have ventured to recommend a small alteration from the present statute, by rejecting from the class of preferred debts, those secured by judgment in the Courts for the trial of small causes.

The only rational question is, whether in the distribution of the *personal estate* of a deceased insolvent, and in the application of it to the payment of his debts, a preference ought to be given to the judgment creditor, which he could not have if his debtor were living. Unless there be execution, the personal property is not bound by the judgment. No *lien* is created by it. Great hardships and perhaps injustice have been known to prevail under the operation of this statutory provision. An insolvent debtor may have taken the benefit of the acts giving relief in cases of insolvency. Judgments may have been obtained against him, and from utter hopelessness, process of execution may have been neglected, or deferred.

Benevolent friends, upright and just, may be willing and desirous to afford to the honest, but unfortunate insolvent an opportunity of exerting his industry and his talents for the support of himself and his family. For this purpose they must make advances: years roll on—their confidence in his honor and integrity was not misplaced nor undeserved—the good providence of God blesses his diligence and fidelity, and a comfortable support is earned and obtained for an otherwise suffering family. During his life time the just and sacred rights of those who have thus placed their property in his hands

are regarded and held inviolable. But the moment of his death, uncertain as it is, sweeps away all these rights. A dormant judgment perhaps almost forgotten, and certainly till that moment estimated as entirely worthless, awakes from its torpor, and with unsparing hand and exclusive authority, grasps every remnant of estate personal as well as real.

This is no tale of fancy. It has often occurred. Justice has frequently been shocked by such events. And so long as our statute preserves the preference of the judgment creditor, in the distribution of the *personal estate*, such events will occur, to the scandal and reproach of the law, and in mockery of all justice. That the real estate of the deceased insolvent should be redeemed from the *liens* and *incumbrances*, at the time of his death, if *it be worth such redemption*, is perfectly reasonable and proper. The question hence arising is, ought not the distribution to be *of the residue?* And ought it not to be *confined to the residue?* That surely is the estate proper.

Yet, notwithstanding all this, I have not felt at liberty to report the bill in that shape, but have preserved the preference of the judgment creditor, in the distribution of the personalty, as well as of the real estate. The exalted and supereminent power of making the *rule of action*, belongs to the Legislature alone. If they shall think that this preference ought to be confined to the real estate, and ought to extend no further than as it is a lien, they will perceive that the numbers of this first section are so arranged, that a very slight verbal alteration will effect the object they shall have in view.

3. This is in accordance with the laws of the United States, which declare that all debts due to the United States, of all descriptions, must first be paid. L. U. S. 2d Vol. 285, Sec. 5. *The supreme law of the land* having established the principle, it follows that the laws of the several states ought to conform to it. 2d Cranch 258.

The laws of the United States extend a like preference to the sureties of their debtor.

4 and 5. Require no remark.

6. Is so equitable and so reasonable, that it seems strange that the law ever was otherwise.

Section II. The first section of this bill having prescribed the order of the payment of debts, the second proceeds to ordain in what manner obedience shall be compelled.

1. Prescribes a plain duty of the executor, or administrator, to present a petition under oath to the proper Court setting forth the facts, and praying their aid and advice.

2. Directs the action of the Court upon it, and commands a proper reference to a Master, to inquire into the truth of the matters alleged.

3. Directs that the Master as an officer of the Court, shall require the creditors to exhibit their claims *to him* properly verified.

4. Authorizes and commands a limitation, which is esteemed more equitable and convenient, than any statuatory regulation can make.

5. Authorizes and directs the Court by their decree, to bar all other creditors of their action.

As the law now stands, the bar is a matter *in pais*. The report to the Court, surely, ought not to be made by one, who is to be a party to the future suit. The suggested alteration seems more to agree with the principles of equity.

6. Is a direct inference from what has preceded it, but is set down in express words *ex majori cautela*.

7, 8 and 9. Relate to exceptions to be taken before the Master against the claims of creditors, and the account and exhibition of the executor, or administrator.

Section III. Makes it the duty of the Master faithfully to try the matters in question; and to decide them according to truth and right.

It cannot escape the observation of the Legislature, that neither in this bill, nor in the bill entitled an act respecting the Orphans' Courts, is it contemplated to appoint auditors to examine, or restate the accounts of executors, or administrators. On the contrary, it is studiously and carefully avoided. The business usually committed to auditors, can be done by a single Master much better, with less delay, to more effect, and with almost no proportion of the expense. Trials before auditors, as they have been conducted for the last five and thirty years, have been grievous to be borne. The shame and regret that such has been the case, cannot be lessened by the remembrance, that Orphans and widows, and others incapable of sounding their complaints, have been the sufferers and victims. They have endured numberless oppressions, and were ignorant of the source of their calamities.

Why should a trial so expensive, so delaying, so burthensome, and so unsatisfactory be retained ? What one benefit, or advantage does it offer, or produce ? Can the well known and humiliating fact, that the appointment to the office of auditor, is anxiously sought as a source of profit and revenue to the Judges of the Inferior Court of Common Pleas plead any apology ? It is inconceivable that an intelligent and just Legislature will approve, or tolerate such abuses.

It is hoped that the substitute proposed will meet approbation. It is certainly desirable that the proceedings in these Courts, should be assimilated as far as may be, to those in the Court of Chancery.

The eight numbers which compose this section are certainly required, if the principle be adopted.

Section IV. Is composed of fifteen numbers.

1. Provides for exceptions to the Master's report and decision.

2. Requires that they shall be examined on equitable terms.

3. Provides for the admission of evidence forgotten, or in any other manner omitted ; and allows the Court to receive it in discretion, and on reasonable terms, but at the sole costs of the party applying to have it received.

It is certainly repugnant to our sense of right, that Courts of justice should be compelled to shut their eyes, and be blind to important and material truth. The power here given is in strict analogy with the usual authorities of the *civil* and *equity* law.

4. Requires no comment.

5. Contains a caution, the principle of which has been before discussed in various ways.

6. Flows naturally out of 5.

7, 8 and 9. Require no comment.

10. Introduces an alteration, which in some instances is very important and material. In general, on the death of the ancestor, his real estate is cast by operation of law upon the heir by *descent*. The title is actually vested in the heir : and therefore orders for sale, and sales actually made, are by the statute declared to vest in the purchaser the estate and title which the heir had therein at the date of the order. This number proposes to overreach the title of the heir, and vest in the

purchaser the estate and title of the ancestor at the time of his death, saving the right of dower. This is an insolvent estate, and surely there can be no impropriety in avoiding the dangers arising from insolvency, or embarrassments of the heir.

11 and 12. Are plain consequences.

13. Provides for the decree of distribution. That the distribution ought to be by *decree*, public, open and certain, must be obvious.

14. Contains a caution, and provides for the case where the executor, or administrator, shall refuse, or neglect to enter into recognizance required of him. That in such case, the Court shall have the power of dealing with him very summarily, and of executing their decree by their own officer, will not I think be denied, or questioned.

15. Results as a consequence in pursuing the caution.

Section V. Consists of four numbers.

1. Contains some rules in relation to suits pending against an executor, or administrator, at the time of his petition. It is very desirable to curtail the expenses in the cases of insolvent estates. They are enormous and oppressive, and seem to grow in an inverse ratio, with the means of satisfying the just claims of the creditors.

No reason is known, or imagined, why suits under such circumstances should not be immediately suspended. The fair examination of the claims in the Court of *account* is more familiar, expeditious and satisfactory.

2. This prohibition is proper for the same reason.

3. Provides a relief for creditors, who shall have been barred by the decree, in case the estate real and personal, shall be more than sufficient to pay off and satisfy all the creditors to whom distribution is ordered to be made.

4. In like manner contemplates the possibility that from the rise of value, or from other causes, the estate shall produce a surplus after paying all the debts ; and it directs that such surplus shall be paid to the persons thereto by law entitled.

Section VI. Is entirely in conformity with the existing law.

Section VII. Is intended to give to the Prerogative Court, and to the Orphans' Courts, the same process for the purpose of compelling obedience to their decrees, under the provisions of this law, which they have a right to use in other and ordidinray cases.

AN ACT RELATIVE TO DOWER.

SECTION I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

The widow, whether alien, or not, of any person dying testate, or intestate, shall notwithstanding any last will, testament, or codicil, be endowed, as well of the personal estate of her husband, as of the real estate, whereof he, or any other to his use, was seized during the coverture.

SEC. II. *And be it enacted by the authority aforesaid,* That—

1. The dower of the widow, in and out of the real estate of her husband, shall be for the term of her natural life:

2. And shall be the full and equal third part of all the lands, tenements, hereditaments and real estate, whereof the said husband, or any other to his use, was seized of an estate of inheritance, at any time during the coverture, to which she shall not have relinquished, or released her right of dower by deed, executed and acknowledged, in the manner prescribed by law for that purpose; whether any issue which she might have had of the marriage, could have inherited the said lands, tenements, hereditaments and real estate, or not.

3. If a husband seized of an estate of inheritance in lands, tenements, hereditaments and real estate, shall exchange the same for other lands, tenements, hereditaments, or real estate, his widow shall not have dower of both; but shall make her election to be endowed of the lands given, or taken in exchange; and if such election be not evinced, by the commencement of proceedings to recover her dower of the lands given in exchange within two years next after the death of her husband, she shall be deemed to have elected to take her dower of the lands received in exchange.

4. If a person seized of an estate of inheritance in lands, tenements, hereditaments, or real estate, shall have mortgaged the same before his marriage, his widow shall, nevertheless, be entitled to dower out of the premises so mortgaged, as against every person, except the mortgagee, and those claiming under him.

5. If the husband shall purchase lands, tenements, hereditaments, or real estate during coverture, and shall at the same time mortgage his estate in the same lands, tenements, hereditaments, or real estate, to secure the payment of the purchase money, or any part thereof; his widow shall not be entitled to dower out of such lands, tenements, hereditaments, or real estate, as against the mortgagee, or those claiming under him, although she may not have united in such mortgage: but she shall be entitled to her dower out of the same lands and premises, as against all other persons.

6. Where the husband, or the husband and wife, shall have mortgaged any lands, tenements, hereditaments, or real estate of the husband; and the mortgagee, or those claiming under him, shall after the death of the husband, cause the mortgaged premises, or any part of them to be sold, by virtue of the decree of the Court of Chancery; and if any surplus shall remain, after payment of the moneys due on such mortgage, together with the costs and charges thereon, the widow shall nevertheless be entitled to the interest and income of one third part of such surplus, for her life, as her dower in and out of the same.

7. The widow shall not be endowed of lands and premises, conveyed to her husband by way of mortgage; unless he shall have acquired an absolute estate therein during coverture.

Sec. III. *And be it enacted by the authority aforesaid,* That—

Until dower be assigned to her out of the real estate of her husband, it shall be lawful for the widow to remain in, and to hold and enjoy the Mansion House of her deceased husband, and the messuage and plantation thereto belonging; without being liable to pay rent for the same: and during the same time, she shall have reasonable sustenance out of the estate of her husband.

Sec. IV. *And be it enacted by the authority aforesaid.* That—

1. If the widow be deforced of her dower, or cannot have it without suit, or if her dower be unfairly assigned, or not assigned within forty days after the death of her husband, then she may sue for and recover the same with damages: that is to say the value of the whole dower to her belonging, from the time of her husband's death, if he died, or shall die seized: or from the time of demanding dower, if the husband was, or shall be seized, but did not, or shall not die so seized, unto the

day that she shall recover seizen of her dower by judgment of the Court.

2. The writ of dower called *unde nihil habet*, shall not abate by the exception of the tenant that the demandant hath received her dower of another person, before her writ was sued out ; unless he can shew, that the dower so received, was in satisfaction of her right of dower in the lands, or tenements, whereof she demands dower.

3. If the husband being impleaded for land, give up the same to his adversary by covin, his widow shall recover her dower of the said lands ; and if the husband lose the land in demand by default, the widow demanding her dower thereof shall be heard ; and if it be alleged against her that her husband lost the land, whereof dower is demanded by judgment, whereby she ought not to have dower ; and then it be enquired by what judgment, and it be found, that it was by default whereunto the tenant must answer ; then the tenant must answer further ; and shew that he had and hath right in the said land, according to the form of the writ, that the tenant before sued out against the husband : and if he shew that the husband of such wife had no right in the lands, nor any other but he that holdeth them, the tenant shall go quit, and the widow shall not recover her dower therein ; but if he shew not the same, the widow shall recover her dower.

4. Where a widow having no right to demand dower, sues out a writ of dower against the guardian of the heir, such heir being within age, and the guardian endows the widow by favor, or makes default, or by collusion defends the plea faintly, whereby she is awarded her dower in prejudice of the heir; in every such case the heir when he comes to full age, shall have the like action to demand the seizen of his ancestor against such widow as he should have against any other deforcer. But the widow shall in such action, be allowed to shew, that she had a right to her dower, and if she shew such right, she shall go quit, and retain her dower, and if she shew it not, the heir shall recover his demand.

5. In like manner the widow shall be aided, if the heir, or other person implead her for her dower ; or if she lose her dower by default ; in which case the default shall not be so

prejudicial to her, but that she shall recover her dower if she have right thereto, and she shall have a writ in this form :

Command A that justly and without delay, he render to B. who was the wife of C, so much land, (specifying the land,) with the appurtenances in D, which she claims to be her reasonable dower, or of her reasonable dower, of which the aforesaid A, deforceth her, &c.

And to this writ, the tenant shall have his exceptions, to shew that she has no right to be endowed ; and if he can verify his exception, he shall go quit : and if not, the widow shall recover the lands, whereof she was before endowed.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. A writ of admeasurement of dower shall be granted to a guardian, and the heir when he comes of full age, shall not be bound by the suit of such guardian, if it be by collusion ; but he may admeasure the dower after, as it ought to be admeasured by law.

2. In the writ of admeasurement of dower, as well as in the writ of admeasurement of pasture, if the defendant come at the day contained in the writ, to answer the plaintiff; the plea shall pass between them : and if he come not, admeasurement shall be made upon his default.

3. No Sheriff shall hold plea of admeasurement of dower, or of pasture.

4. Every writ of dower, and of admeasurement of dower, or pasture, shall issue out of, and be returnable to the Supreme Court of this State, or to some, or one of the Superior Courts of Common Pleas : all which Courts are hereby declared to have cognizance of the same.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. Whenever an estate in lands, tenements, or hereditaments, shall be conveyed to any person and his intended wife, or to such intended wife alone, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent ; such jointure shall be a bar to any claim, or right of dower of such wife of the residue of the lands, tenements, hereditaments and real estate, which at any time were her said husband's.

Nor shall she demand, claim, or have her dower of, or against them, or any of them, who shall have the lands, tenements, or hereditaments of her said husband.

2. The assent of the wife to such jointure, shall be made manifest only by her having become a party to the conveyance, by which the said jointure, shall have been settled, she being at the time of the full age of twenty-one years.

3. Any pecuniary provision, that shall be made for the benefit of an intended wife, and in lieu of dower, shall if assented to by such intended wife, in form and effect as above provided, be a bar to any right, or claim of dower of such wife, to any lands, tenements, hereditaments, or real estate, which at any time shall have been her said husband's.

4. If before her coverture, but without her assent signified, as above provided ; or if after her coverture, lands, tenements or hereditaments shall be given, or assured for the jointure of a wife, or any pecuniary provision be made for her lieu of dower, the widow may at her election, forego and waive such jointure, or pecuniary provision, and demand and have her dower of, and in the lands, tenements, hereditaments and real estate of her husband as aforesaid.

5. If lands shall be devised to a woman, or a pecuniary, or other provision be made for her by will, in lieu of dower, the widow may, nevertheless at her election, forego and waive such devise, or pecuniary, or other provision, and demand and have her dower in the lands, tenements, hereditaments and real estate of her husband as aforesaid.

6. If the widow be lawfully expulsed, or evicted from her jointure, or from any part thereof, without fraud, or covin, by lawful entry, or action, or by discontinuance of her husband, she shall be endowed of as much of the residue of her husband's lands, tenements, or hereditaments, whereof she was before dowable, as the same lands, tenements, or hereditaments, from which she shall be so evicted, or expulsed shall amount, or extend to.

7. In like manner if the devise, legacy, or pecuniary provision, which shall be made for the benefit of any intended wife in lieu of dower, shall fail in part, or in whole, from any cause not being the fault of the widow, she shall be endowed of so much of her husband's lands, tenements, or hereditaments, as shall make up and supply the entire deficiency of the value and amount of the said devise, legacy, or pecuniary provision so failing as aforesaid.

SEC. VII. *And be it enacted by the authority aforesaid*, That—

1. The dower of the widow in and out of the personal estate of her deceased husband, shall be absolute :

2. And shall be, in case the husband shall leave children, or other lineal descendant, one full and equal third part of the whole surplus of his personal estate, goods, chattels, credits and effects, after payment of debts, and charges and expenses of settling the estate :

Provided, always, that the said full, equal third part of the said surplus, shall not exceed such sum as would have been a child's share, in case the husband had died intestate ; and if the said full equal third part shall exceed what would have been a child's share, in case the husband had died intestate, then and in that case, the widow's dower in and out of the personal estate of her deceased husband, shall be reduced to such amount, as would have been a child's share, if the husband had died intestate.

3. If the deceased husband, whether testate, or intestate, shall leave no children, nor other lineal descendant, then and in that case, the widow's dower in and out of the personal estate of her deceased husband, shall be one full moiety of the said surplus.

SEC. VIII. *And be it enacted by the authority aforesaid*, That—

The Court of Chancery, the Prerogative Court, and the Orphans' Court, in and for the several and respective counties of this state, shall in their several and respective jurisdictions and according to the rules and proceedings of the said several Courts, have full power and authority to order, adjudge and decree to the widow her reasonable and lawful dower in and out of the estates real and personal of her deceased husband, with just and proper assessment of damages for the detention of the same, and costs, where damages and costs ought to be allowed according to the true intent and meaning of this act : and the same order, judgment, or decree, to cause to be executed and obeyed by proper and convenient final process, to be selected, or devised in legal discretion.

SEC. IX. *And be it enacted by the authority aforesaid*, That—

1. In case there shall be a decree of divorce, dissolving the bond of matrimony for the fault of the wife, she shall not be endowed.

2. If the wife voluntarily leave her husband and go away,

and continue with her adulterer, she shall be disabled and forever barred from having her jointure, or dower in, or out of the estate real, or personal of the deceased husband; unless her husband be voluntarily reconciled to her, and suffer her to dwell with him, in which case she shall be restored to her jointure, or dower in and out of the estates real and personal as aforesaid.

3. If a wife after being ravished, consent to the ravisher, she shall be disabled, and forever barred of her jointure, or dower as aforesaid: unless her husband be voluntarily reconciled to her, and suffer her to dwell with him, and then she shall be restored to her jointure, or dower as aforesaid.

Sec. X. *And be it enacted by the authority aforesaid*, That—

1. Every jointure, devise, legacy and pecuniary provision in lieu of dower, shall be forfeited by the woman for whose benefit it shall be made, for the same causes, and in the like cases, in which she would forfeit her dower: and upon such forfeiture, any estate so conveyed for jointure, and every devise, legacy and pecuniary provision so to be made as aforesaid, shall immediately vest in the person, or his legal representatives, in whom they would have vested in the determination of her interest therein, by the death of such woman.

2. The widow shall demand her dower in the real estate of her husband, and within twenty years after her title thereto shall have accrued and not after: Provided, that the time during which she shall be an infant, insane, or imprisoned, shall not be taken, or computed as any part of the above limited period of twenty years.

Sec. XI. *And be it enacted by the authority aforesaid*, That—

1. No act, deed, or conveyance executed, or performed by the husband, without the assent of the wife, evinced by her being a party thereto, and acknowledging the same, in the manner required by law to pass the estates of married women, and no judgment, or decree confessed by, or recovered against him, and no latches, default, covin, or crime of the husband, shall prejudice the right of his widow to her dower, or jointure, or preclude her from the recovery thereof, if otherwise thereto lawfully entitled.

2. If the widow shall unreasonably detain the chartes, title, deeds, or evidences of the estate from the heir, or other

person thereto lawfully entitled, she shall be prevented from her dower, until she restores the same.

3. If the widow when sole, or with any after taken husband, shall alien, grant, convey, bargain, or sell, the lands, tenements, hereditaments, or real estate assigned to her in dower, or any of them, whether the same be with, or without warranty; or the lands, tenements, hereditaments, or real estate given, devised, granted, conveyed, or bargained to her, or for her use, in, for, or as her jointure, such alienation; grant conveyance or bargain, shall be valid and effectual, according to the terms of the said alienation, grant, conveyance, or bargain, not exceeding the natural life of the said widow, or wife:

Provided, that the said widow, or wife be not otherwise by law disqualified from making such alienation, grant, conveyance, or bargain.

4. Such alienation, grant, conveyance, or bargain of the said lands, tenements, hereditaments, or real estate shall not be deemed, or taken to be cause of forfeiture of dower, or jointure, nor shall in any wise prejudice the right of the widow thereto, except according to the terms of the said alienation, grant, conveyance, or bargain as aforesaid.

5. The widow may bequeath her *emblements*, if she shall not otherwise by law be disqualified from making a last will, or testament.

6. Her *emblements* if not bequeathed, or otherwise disposed of, shall go to her administrator, and shall be assets in his hands.

7. The alienee, or grantee of the widow, and those claiming under him, shall in like manner take the *emblements* to his and their own use.

REMARKS UPON THE ACT RESPECTING DOWER.

Dower is intended to be a reasonable and just provision for the widow out of the estate of her deceased husband.

That such provision ought to be made, that it should be fair and liberal, and that it ought to be established by certain and prudent rules, none will attempt to deny.

Positive law has for a long course of years, confined the dower to the realty. This is peculiar to the law of England. The

civil law knew no such principle; and had nothing that bears resemblance to it; but provision for the widow and younger children was by no means neglected.

It was esteemed just and right in early time in England, as it certainly is in all time, that dower should be given to the widow, for her support and sustenance, and for the nurture and education of younger children. To attain this important object, the attention of the Legislature was drawn to that property of the husband, which was permanent and valuable. Chattels were then of little estimation. Credits to any extent were unknown. The personal estate of a man was scarcely brought into account. Wealth was computed only in lands. At that time, and in such a view of property, it was claimed and most pertinaciously insisted upon, that the widow's portion should be a life estate in one third of the realty of which the husband was seized at any time during coverture.

The oldest and most venerable statute in the statute book ratifies and acknowledges this as her *right*. There it is recorded and enrolled among the *liberties of England*, asserted and defended with arms and unto blood: and from that day to this, through all the changes of the values of property, the principle and the rule have been unalterably the same.

By the ancient common law, as it stood in the reign of Henry the second, the personal estate of a man, was to be divided into three parts, one of which went to his heirs, or lineal descendants, another to his widow, and the remaining third he might bequeath, or otherwise dispose of. If he had no wife, then he might dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to a moiety, and he might bequeath the other. But if he had neither wife, nor child, the whole was at his own disposal. The shares of the wife and children were called their *reasonable parts*, and the writ *de rationabili parte bonorum* was given to recover them.

The law of Scotland, in like manner divides the personal property of the husband; and the right of the wife and children to the *pars rationabilis* is held sacred and inviolable to this day.

The statute of distribution 22 and 23 Car. 2d c. 10, penned by Sir Walter Walker, the most eminent civilian of his day, and one of the most profound lawyers of any age, disposes of

the personal property of a *deceased intestate* in a manner very similar in many respects.—This statute has long since been re-enacted in N. Jersey, and in almost all the states of the Union.

Very general indeed is the assent of society, that the widow ought to have a *right* to a reasonable portion of her deceased husband's personal estate. If such ought to be her *right*, then surely his will ought not to deprive her of it.

I cannot help adding, that by the marriage, the husband, if he chooses, becomes the absolute proprietor of the personal estate of his wife, and he very seldom fails to assert that choice. His interest in her real estate is to remain during coverture, and probably during life. Very often, nay generally, in this country, it becomes expedient to make sale of her lands. With very few exceptions, and then not promising a happy result, she is under his influence, and I may almost say his control. Generally therefore, she unites with him in the sale, and the purchase money may become his own, and if re-vested in the purchase of other lands, the title is made to him alone. Can we then deny that justice and fairness require some provision of law to meet this extreme inequality.

The widow has not only a civil, but she has also a moral right to dower. It is as repugnant to religion and morals, as it is contrary to law, to deprive her of it.

The view of this subject taken by Sir Joseph Jekyl 2 P. Wms. 702, is full of instruction and truth. Dower is and always has been a favorite of the law. "It has become," says Bacon, "a common bye word in the law, that the law loveth three things, life, liberty and dower." It overruns the claims of creditors, and extends to all real estate of an inheritable character, which has belonged to the husband during coverture: and it is right that it should be so. Her title being consummate upon the husband's death, has relation back to the marriage, and therefore precedes all incumbrances created by him after that time. *Dotem non uxor marito, sed uxori maritus offert.*

I have felt it to be my duty in presenting this bill to the Legislature to suggest to them the propriety of extending the dower *eo nomine*, so as to reach a *reasonable portion* of the surplus of the personal estate of the husband after the payment of his debts. Proud and elevating will be the remembrance that New-Jersey has set the honorable example, and has been the

first to make provision for the widow out of the personal, as well as the real estate of her husband, a provision independent of him, and of which he cannot by will deprive her.

Section I. This declares the general principle, to which I have already adverted.

Section II. Ascertains what shall be the dower of the real estate.

1. Declares it to be an estate for life.

2. That it shall be one third part of all real estates of inheritance, whereof the husband shall have been seized at any time during coverture, and which she shall not have released. This is as the law now stands, R. L. 397, Sec. 1. I have added to it a rejection *in express terms* of the feudal condition that *issue which she might have had of the marriage, could have inherited the same real estate.* It cannot be necessary to discuss this subject to any greater length.

3. It is believed that all respectable authorities concur in this; although in strictness of language the husband was certainly seized of both estates during the coverture. The propriety and the justice of *giving* and *requiring* election seems manifest. Perk. 318, 319, Co. Lit. 316, Leon 285. Where a right of election is thus expressly given by statute, it naturally follows that some specified time should be appointed, in which the election is to be made known, or that the alternative shall be presumed.

4. This is a familiar principle at law and in equity, and why it has not been expressly enacted I am at a loss to answer. 7 John. 278, 15 John. 319.

5 and 6. Are on the same footing, and are supported by numerous authorities in our own Court of Chancery, and also in New-York. 1 J. C. R. 45, 5 J. C. R. 482.

7. Requires no comment.

Section III. Is in conformity with the existing law. R. L. 397, Sec. 2. The latter clause, which requires that the widow shall have *reasonable sustenance* during her *quarantine*, was, for some reason entirely unknown, omitted in our statute. The old treatises, without one exception, contain it. It is confirmed in Mag. Car. c. 7. It is re-enacted in almost all the states of the Union. I have taken the liberty to re-annex it to the statute, and bring it before the Legislature.

Section IV. Consists of five numbers, and comprehends the 3d, 4th, 5th and 6th sections of the act relative to dower. R. L. 397.

1. Is extracted from Stat. 20 Hen. 3, c. 1. commonly called the statute of Merton.

2. Is taken from 3 Edwd. 1 c. 49.

3, 4 and 5. Are from 13 Edwd. 1 c. 4.

In reporting these to the Legislature, the late Judge Patterson adopted the very language of the old statutes, except where alterations became absolutely necessary.

That language, however antiquated and inelegant, had received judicial construction from the year 1825, and there was no remaining doubts to be set at rest.

Sec. V. The same remarks apply with equal force, and *in extenso* to the four numbers composing this section. They are taken from 13 Edw. 1, c. 7. and sections 7, 8 and 9 of our statute. R. L. 399. The reason of the slight alteration in 4, with respect to the jurisdiction, must be obvious.

Section VI. Jointures in bar of dower are entirely the creatures of statute. A very strict construction has been given to that of 27 Hen. 8, c. 10, as it was deemed derogatory of common right. But that a fair contract, entered into between parties under no legal disability to contract, for a certain definite settlement in lieu of dower, ought to prevail, and to be carried into effect, seems at this day a proposition that carries its own evidence.

1. Declares it to be lawful to make such jointure, and that if valid and effectual, and with the assent of the intended wife, it shall bar her right of dower in the residue of the lands of her husband.

2. Describes how that assent shall be expressed, and requires that it shall be only by deed. An infant within the age of twenty-one years, is incapable in law of making such a contract, or of signifying such an assent.

3. Authorizes a pecuniary provision in lieu of dower, and assented to in like manner, and by a woman of like capacity, to take effect, and bar the right of dower.

4. Acknowledges the right of the widow to elect in all cases, where she has not given the express assent before mentioned.

5. Extends the same principle to devises and legacies, to be given to a woman in lieu of her dower.

Section VII. The object of this section is, to determine the amount of the dower of the widow in and out of the personal estate of the husband.

If it shall please the Legislature to adopt the principle recommended, there can be but little doubt as to the amount. The statute of Distribution is almost two hundred years old. So far as it respects the widow's portion, it has received universal approbation. Jurists, philosophers and law givers, have concurred in pronouncing its eulogium. It will be seen that in no case can the widow's dower in and out of the personal estate, amount to more than what the Legislature of this state in adopting and re-enacting the statute of distributions, have adjudged to be a reasonable portion. In many cases it will not be so much. It cannot exceed what would be a child's share in the case of intestacy.

Section VIII. Courts of equity have properly jurisdiction of dower, not by writ but by bill.

It is here proposed to extend this equitable jurisdiction, so that not only the Chancery, but the Prerogative Court, and the Orphans' Courts shall have cognizance of the subject.

This jurisdiction is not intended to be exclusive, nor is it so expressed. It will by no means interfere with the proper cognizance of the subject, by the Courts of law by writ: and it is hoped and believed that much good may be the result.

Sec. IX. Relates to the forfeiture of dower.

1. Such decree as is here described, can be pronounced only *on full trial:* and if the decree be just, the culprit convict ought not to meet the consideration due to a chaste, virtuous, and affectionate wife.

2. Is copied literally from our statute. R. L. 400. It was taken from 13 Edw. 1, c. 34, and was re-enacted in 1799 in this state with universal approbation.

3. Is copied in like manner from the same page. It was taken from 6 R. 2, c. 6.

Sec. X. 1. Directs a forfeiture of the jointure, devise, legacy, or pecuniary provision in lieu of dower for the same causes that would forfeit the dower. To this there can be no possible objection.

2. Is a statute of limitation with respect to the claim of dower. It is much controverted, whether the statutes of limitation as they are drawn, extend to the dowress. In New-York it has repeatedly been decided in the negative. 6 John. 290, 6 J. C. R. 194. In New-Jersey it is *questio vexata.*]

Sec. XI. 1. Is intended to be declaratory. The ancient law which declared that the treason, or crime of the husband should work forfeiture of the dower of the wife, has long since been held in abhorrence. It is now universally assented to, that neither his contract, his default, nor his crime, from which during coverture she may have suffered in poverty and in contempt, shall be remembered in prejudice of her sacred right of dower.

2. Is in conformity with the existing law. Hob. 199, 9 Co. 15. Dyer 230, Perk. 359, 360.

3. By the statute 6 Edw. 1, c. 7, commonly called the statute of Gloucester, it was enacted, that upon the alienation in fee or for life, by the tenant in dower, she should forfeit her estate therein, and that the heir should have a present right of entry, and a writ *in casu proviso.* Our statute granting relief in certain cases against collusive judgments and wrongful alienations of lands, 2d March, 1798, R. L. 347, Sec. 7, prohibits alienation of her dower by the woman when sole, under a heavy penalty. The subsequent section extends the like prohibition to the alienation of dower by the woman, with any after taken husband. It is somewhat difficult to reconcile the proviso in the 9th section, p. 348, with the enactments of the two preceding.

The evils arising from any description of alienation by the tenant for life, have long since been most effectually guarded against. The rights of the heirs and remainder men are no longer affected by such alienations; and it is therefore respectfully suggested, that it is proper distinctly to recognise the right of the widow to sell, or alien her estate in dower at her pleasure.

4. The same remark is applicable to this.

5. This is in conformity with the enactment in the statute. 20 Hen. 3 c. 2. re-enacted in New-Jersey 16th Nov. 1795.

6. I do not find this provision *expressly enacted.* It is certainly received law, is obviously just, and may perhaps be considered as an inference out of 5. It is here set down to remove any possible doubt.

7. If the alienation ought to be valid, during the life of the dowress, then surely the right of the alience to the *emblements* ought to be equally protected.

AN ACT CONCERNING GUARDIANS.

Section I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. Every father being at full age, and being competent to make, execute and publish a last will and testament sufficient to pass real estate, may by his deed, or last will duly executed as aforesaid, dispose of the custody and tuition of a child likely to be born, or of any living child being within the age of twenty-one years and unmarried, during the minority of such child, or for a shorter period, to any person in possession, or remainder.

2. Every such disposition, from the time it shall take effect, shall be deemed and taken to be an appointment of a guardian, or guardians, according to the terms of the disposition, or appointment.

3. No such disposition, or appointment shall take effect, or shall vest any power, or authority in any person to whom the same shall be made or given, until after such person shall have assented to, and accepted the same in the manner hereinafter provided.

4. Every such assent and acceptance shall be in writing, and shall be made in the Prerogative Court of this state, and shall there be filed and recorded.

5. No such disposition or appointment shall take effect, or shall vest any power or authority in any person to whom the same shall be made or given, until after such person shall have taken and subscribed, in the manner hereinafter provided, an oath or affirmation that he will justly and faithfully perform the duties of his office.

6. The oath or affirmation mentioned in the preceding number of this section, shall be taken in the Prerogative Court of this state, and shall there be filed and recorded.

7. Every such disposition as aforesaid, from the time it shall have taken effect in manner aforesaid, shall vest in the person or persons to whom it shall be made, all the rights and powers of a guardian of such minor, and shall subject him or them to all the duties and obligations of a guardian of such minor; and shall be valid and effectual against every other person claiming the custody or tuition of such minor, as guardian in soccage or otherwise.

SEC. II. *And be it enacted by the authority aforesaid*, That—

1. Any person to whom the custody of any minor is so disposed as aforesaid, shall have full power and authority, after the said disposition shall have taken effect according to the true intent and meaning of this act, but not before, to take the custody and tuition of such minor, and to maintain an action of *ravishment of ward or trespass* against any person or persons who shall wrongfully take away or detain such minor, for the recovery of such minor: And shall and may recover damages for the same in said action for the use and benefit of such minor.

2. Every testamentary guardian, guardian in soccage, or other guardian, shall take into his custody for the use of his ward, the profits of all the lands, tenements, hereditaments and real estate of his ward.

3. He shall also take the custody and management of the goods, chattels and personal estate of his ward during the minority of such ward, or for any shorter period, according to the disposition or appointment as aforesaid.

4. He may bring such action or actions in relation to the estate of the ward, real or personal, as by law a guardian in common soccage might do; and he shall recover damages therein for the use and benefit of his ward, if according to truth and right, damages ought to be awarded.

SEC. III. *And be it enacted by the authority aforesaid*, That—

1. If no guardian for any such minor shall have been appointed by the father by deed or by will: or if the person or persons therein appointed as guardian or guardians shall refuse or neglect to accept the said appointment according to the provisions of this act; or shall refuse or neglect to take and subscribe the oath or affirmation by this act also required, within such reasonable time as the Prerogative Court of this state shall limit and appoint; or if the person or persons in the said deed or will appointed as a guardian or guardians,

shall neglect or refuse to give such bond with sureties, as shall be further required in pursuance of this act, within such reasonable time as the Prerogative Court of this state shall limit and appoint, then, in either of the above cases, it shall be lawful for such minor, being above the age of fourteen years, to apply by petition to the Ordinary, to the Orphans' Court of the proper County of such minor, or to the Surrogate of the same county, for the appointment of a suitable guardian or guardians for such minor.

2. If such minor be within the age of fourteen years, any relative or other proper person may, by petition, apply to the Ordinary, the Orphans' Court, or Surrogate, as the case may be, for the appointment of a guardian for the minor until he shall arrive at the age of fourteen years, and until another guardian shall be appointed.

3. Upon the presenting of any petition for the appointment of a guardian or guardians, the Ordinary, the Orphans' Court, or the Surrogate before whom the matter shall be, shall according to the rules of practice in their courts, respectively, diligently inquire into the circumstances of the case, and shall ascertain the amount of the personal property of the said minor, together also with the value of the rents, issues and profits of his real estate: And for that purpose may, by proper process, compel any person to appear in Court and testify in relation thereto: And shall proceed to take order for the appointment of some suitable person or persons as guardian or guardians for such minor.

4. In the appointment of a guardian for a minor under the age of fourteen years, *if the father be dead*, preference shall be given as follows: First, to the Mother, if she be unmarried: Second to the Grand Father, on the Father's side: Third, to the Grand Father on the Mother's side: Fourth, to one, or more of the Uncles, on the Father's side: Fifth, to one, or more, of the Uncles, on the Mother's side: Sixth, to any other proper person who will accept the same.

5. The Court before whom the matter may or shall be, shall have the same discretionary authority in selecting the guardians, as by law is given in the appointment of administrators.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. Every person to be appointed a guardian for any minor, by the Ordinary, the Orphans' Court of any County, or by

the Surrogate of any County, shall before receiving letters, execute a bond to this state, with two or more sureties, to be approved of by the Ordinary, the Orphans' Court, or the Surrogate, as the case may be, and to be jointly and severally bound.

2. Every person to be appointed the guardian for any minor, by deed or last will, shall, before he exercises any authority over the minor, or his estate, and within such reasonable time as the Prerogative Court of this state shall appoint, execute a bond to this state, with two or more sureties, to be approved of by the Ordinary, and to be jointly and severally bound.

3. The penalty in such bonds shall be respectively not less than twice the value of the personal estate of the minor, together with five times the annual value of the rents, issues and profits of his real estate.

4. The condition of the said bond shall set forth the manner and nature of the appointment, and shall require that the said guardian shall do and perform all the duties of guardian, specially set forth in the appointment, if the appointment shall be by deed or by will, and shall in all cases whatsoever require the said guardian, within three calendar months from the date of the said bond, to deliver on oath or affirmation, to that court whence the letters shall issue, or in that court where the assent and acceptance shall be expressed, in manner aforesaid, as the case may be, an inventory of all the estate, real and personal, of the said ward, which he shall have received or taken possession of: And in like manner, an inventory of all such property of his ward as shall come to his hands or possession at any time thereafter: And also, to take just and faithful care of the person, education and estate of his ward and of all writings and evidences touching the lands or other estate of his ward, and render the same to him at full age, or at such other time as he shall be lawfully required so to do: or to render the same to such other person or persons, as by law may be entitled to receive the same: And also to render a just and true account of the rents, issues and profits of the real and personal estate of the said ward, once in every year, and oftener, if by law required so to do: And also, to improve the estate of his ward, for the best use and advantage of the same: And to make no sale of the real estate, unless thereto authorized by law: And also, to commit no waste, spoil or destruction

thereof, or therein: And also, in general, to do and perform all such acts and things as shall be required of him in the faithful discharge of the duties of a guardian for such ward.

5. All bonds in cases of guardianship, and which shall be given in pursuance of this act, or in pursuance of any other act of the Legislature, shall be good and available to all intents and purposes, and shall be pleadable in all courts of justice.

6. In case any such bond shall become forfeited, it shall and may be lawful, at the request, and on the petition of the minor, or of any proper person on his behalf, or of any other party aggrieved, to prosecute the same bond to judgment in the Prerogative Court, the Orphans' Court, or in any other Court having competent jurisdiction thereof: And it shall be lawful for the same Court, from time to time to assess the damages, and issue execution thereon with costs, not exceeding in the whole the penalty of the said bond, to and for the use and benefit of such minor or other aggrieved party.

7. Every person who shall be appointed the Guardian for any minor, by the Ordinary, the Orphans' Court of any county, or by the Surrogate of any county, shall, before receiving letters, become bound to this state by recognizance, in such sum as the Ordinary, the Orphans' Court, or the Surrogate, respectively, shall direct; upon condition that such Guardian shall and will well and faithfully execute the trust reposed in him as such Guardian, and will faithfully obey all such orders and decrees as the Prerogative Codrt, the Orphans' Court, or any other Court of competent jurisdiction and authority, may make of and concerning him in the premises, or of and concerning the care and custody of the person and estate of the ward so committed to him.

8. In all cases where the letters of guardianship shall issue from the Ordinary, the recognizance, or recognizances before mentioned, shall be taken before the Ordinary, or before one of the Masters of the Prerogative Court, and shall be binding and obligatory upon all and every of the said recognizors, and upon all their lands, tenements, hereditaments and real estate, according to the terms of the recognizance, wheresoever in this state the same may lie or be situate.

9. In all cases where the letters of Guardianship shall issue from the Orphans' Court of any county, or from the Surrogate

of any county, the recognizance, or recognizances before mentioned, shall be taken before the said Orphans' Court, or before one of the Masters thereof, or before the Surrogate granting the same letters; and shall be binding and obligatory upon all and every of the said recognizors, and upon all their lands, tenements, hereditaments and real estate, according to the terms of the recognizance, wheresoever in the same county the said lands, tenements, hereditaments and real estate may lie or be situate.

10. The recognizance and recognizances to be taken by virtue of this act, in or before the Orphans' Court of any county, or before any Master thereof, or before the Surrogate of any county, may by permission of the Ordinary, be prosecuted in any Court of competent jurisdiction to judgment by *Scire Facias*, or by action of debt, or both: and it shall be lawful for the same Court or Courts, from time to time to assess the damages, and issue execution therein with costs, not exceeding in the whole the amount set forth in the said recognizance, to and for the use and benefit of the said minor, or other party aggrieved.

11. And the said bonds and recognizances so as aforesaid to be taken, executed and entered into, shall be for the security, use, interest and benefit of all and every minor, or other person, who shall be aggrieved in and through the default, delinquency, unfaithfulness, negligence, or insolvency of the said guardians respectively.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. Every testamentary Guardian, guardian in soccage, or other guardian, shall within three months after his acceptance, or appointment to his office, deliver into that Court where by law he is, or shall be bound to account, a just and true inventory, upon oath or affirmation, of all the estate real and personal of his ward, which he shall have received, or taken possession of, or which shall have in any way come to his hands, possession or knowledge, or to the hands, or possession of any other person for his use.

2. He shall account once in every year, and oftener if required: and therein include all additional estate, real and personal, of the ward, by him received, or taken possession since the first, or former inventory, the produce of the estate of his ward, the sale and disposition of such produce, and his disbursements.

3. The inventory and accounts shall be examined by the Court according to their rules of practice ; and the same being found to be true, shall be allowed : Nevertheless, the said ward when he comes to full age, or his personal representative, if he be dead, shall be allowed to re-examine the said accounts, and prove any fraud, falsity, embezzlement, or injustice therein, and if he shall so prove, he shall be relieved.

4. Every guardian who shall not deliver in such inventory and render such account as aforesaid, shall be summoned, and if he remain in default, he shall be displaced.

5. Every Guardian shall be accountable and shall answer for all such of the estate of his ward, as shall have been lost, or injured through his fraud, negligence, or omission.

6. Whenever the Court before whom any guardian is bound by law to account, shall know, or have cause to suspect that the sureties of the said Guardian, or any of them is, or are failing, or in dubious circumstances, the said Court may require and compel such Guardian to give additional and approved securities ; and if he refuse so to do, within such short time as shall be limited, the Court may displace him.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

1. The personal estate of the ward, or so much thereof as shall be necessary, and the rents, issues and profits of his real estate, or so much thereof, as shall be necessary, shall be applied to the proper maintenance and education of the ward ; and just and true account thereof preserved.

2. If the personal estate, together with the rents, issues and profits of the real estate be not sufficient for the proper maintenance and education of the ward, then, in that case, the Court before whom the Guardian is by law bound to account, shall have power and authority from time to time as occasion may require, to order and decree, that the Guardian make sale of so much of the timber growing, or being on the lands of such minor, as may be required for the proper maintenance and education of such minor.

3. The moneys of the minor, and the rents, issues and profits of his real estate, not immediately required for his maintenance and education, shall be put to interest, for the use and benefit of the said minor, by the Guardian, by the leave and under the direction of that Court before whom the Guardian

is by law bound to account, upon such security, and for such length of time, as the said Court shall allow and approve.

4. If it shall so happen that the security so taken *bona fide*, shall prove insufficient, it shall be the minor's loss.

5. If it shall appear to the Court before whom any guardian's account shall be taken and examined, that the moneys of the ward of such guardian, or any part thereof, or the rents, issues and profits of the real estate of such ward ought to have been put to interest for the benefit of such ward, and have not so been put to interest, by reason of any fault, or negligence of the said guardian, in not applying to the Court, for leave and direction to that effect, or by reason of any other remissness, or negligence of the said guardian, then and in that case, it shall be the duty of the said Court before whom the said account is so to be taken and examined as aforesaid, to charge the said guardian in the account aforesaid, with interest on the said moneys, at the rate of ten per cent. per annum for the use and benefit of the said ward: And thereupon to adjudge and decree the said account accordingly.

Sec. VIII. *And be it enacted by the authority aforesaid*, That—

1. No guardian of what kind soever, shall make, or suffer any waste, or destruction of the inheritance of his ward, or of those things which he hath, or may have in his custody; but shall safely keep the same inheritance to the use of the ward; and keep and sustain the houses, gardens and other things pertaining to the same lands, by and with the issues and profits thereof, and with such other moneys belonging to his ward as shall be in his hands.

2. He shall deliver the same to his ward, when he comes to full age, in as good order and condition at least, as such guardian received the same.

3. He shall answer to such ward for the residue of issues and profits of real estate received by him, by a lawful account.

4. If any guardian shall make, or suffer any waste, or destruction of the inheritance, or other real estate of the ward, he shall lose the custody of the same, and of such ward; and shall forfeit to the ward, thrice the sum the damages shall be assessed at by the jury with treble costs.

5. Guardians shall be allowed for their reasonable expenses, and the same rate of compensation for their services as is, or shall be allowed by law to executors.

REMARKS UPON THE ACT CONCERNING GUARDIANS.

Section I. The right and authority of the father to appoint a testamentary Guardian for his minor children, was established in England by statute 12, Car. 11, cap. 24, and it is remarkable that a feature very peculiar in that law has been copied into the statutes of most of the American States. I mean the authority there given to an *infant* father to appoint a guardian for his minor children. Our statute of Wills 16th Nov. 1795, section 10, Pat. 192, is almost a transcript of the British Act of Parliament above mentioned. And it superadds that the infant father may do the same act by deed. Does it not seem inconsistent with our system of law in general, as well as with reason and convenience, to entrust the appointment of the guardian of an infant to one who is himself under the same disability? The law cannot entrust him to make a will disposing of one acre of his lands: he cannot by deed create a debt; he can enter into no covenant: he may possibly at the very moment be under guardianship: he is at an immature age, when improper and undue influence may easily sway his pliant mind. It cannot be right that such an authority should be tolerated. Can a single sound and just reason be assigned why we should thus violate the first principle of law and prudential policy?

1. Suggests an alteration which I am persuaded must meet the approbation of the legislature.

2. Declares the validity of such appointment as is contemplated in 1, and is in conformity with the existing law, R. L. 223.

3. and 4. Require the acceptance and assent of the guardian thus appointed, and prescribe the evidence, and are in conformity with the spirit of our act, R. L. 402, sec. 1.

5 and 6. Relate to the oath of office of the guardian, and agree with the law as it now stands.

7. Is extracted from the 10th section of the act of 16th Nov. 1795, and is declaratory of the authority and duties of such guardian. Pat. 192. R. L. 227.

Sec. II. 1. Contains the substance of the residue of the tenth section of that act.

2. 3. and 4. Are direct consequences from the foregoing, and embody the 11th section of the same act.

Sec. 3. Seeks to provide for the proper appointment of a guardian, where none shall have been appointed by the father, and also where the appointment made by the father shall fail to take effect. That this is a very important matter, and well worthy the attention of the Legislature, is abundantly evinced by their constant anxiety on the subject.

1. Authorizes the minor, being above fourteen years, to petition for the appointment of a guardian. It is respectfully submitted to the Legislature, whether a *nomination* of guardian *by the minor* of such tender years ought to be conclusive, and whether such nomination ought not to be subject to the *approbation* of the Court.

2. Requires no comment.

3. Is a mandatory on the Court to make the proper investigation. The last clause in this number contemplates a legal discretion in the selection of guardian.

4. & 5. Are according to the most approved decisions. It is esteemed a matter of safety and propriety to give to them the force of statute regulations.

Sec. IV. That all guardians, who shall receive the property of their wards, and who have the custody of their estates, shall give proper security for the faithful performance of the duties of their respective offices, seems to be a principle the truth of which is self-evident. But great doubts have been entertained, whether that security ought to be in the shape of a bond or recognizance, to the state or to the ward. I pretend not to express an opinion on the subject. The principal alteration reported is, that the bond shall be taken to the state. By the law as it now stands, and the practice under it, the bond is taken to the Ordinary. Great inconveniences and difficulties have been the consequence.

1. and 2. Enact the general principle, and require the security.

3. 4. and 5. Flow naturally out of 1 and 2.

6. Prescribes the mode of prosecuting the bond to effect.

7. Relates to an additional security to be taken from guardians, in the same manner as it proposed to require it from executors and administrators. All the considerations which

require the latter, apply certainly with equal force to the former, and it is unnecessary here to repeat them.

8. 9. 10. and 11. Explain their objects, and speak for themselves.

Sec. V. 1. and 2. Declare certain duties of the guardian before adverted to, and here specially commanded.

3. Requires the *Court of account* to examine the inventory and account, and reserves to the ward, when he comes to full age, a right to re-examine, but places upon him in general the *onus verificationis.* This is in conformity with the principle of the act of 1st Feb. 1799, R. L. 402, sec. 3.

4. Is in conformity with section 4 of the same act.

5. Is an admitted doctrine of the common law, Litt. 123, 3 Salk. 177.

6. Is extracted from sec. 5 of the act of 1st Feb. 1799.

Sec. VI. 1. Requires that the ward shall be supported, educated and maintained, out of his personal estate and the rents of his real estate, if these shall be sufficient; but if on just and true account they be not sufficient, then—

2. The Court before whom the account is taken, may authorize a sale of wood and timber for this purpose. This is in conformity with the existing law, March 14, 1832.

3. The principle contained in this number, has oftentimes been declared by the Legislature of New-Jersey. A general commandment to this effect by statute is deemed expedient.

4. Is so obviously just as to need no remark.

5. Is in conformity with the present law. R. L. 779, sec. 11.

Sec. VII. Is principally extracted from the statute of waste, 17th March, 1795, R. L. 208.

A SUPPLEMENT TO THE ACT

Relative to the Supreme and Circuit Courts.

Section I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. The Supreme Court shall consist of a Chief Justice, and four Associate Justices.

2. The Chief Justice, or one of the Justices of the Supreme Court, shall four times a year, hold a Circuit Court in every county of this State, for the trial of issues which have been, or shall be joined in the Supreme Court, or in any other Court, and brought into the Supreme Court to be tried, and which are or may be triable in the said county.

3. The Circuit Courts in and for the several counties of this state, shall be held at the times and places appointed, or that shall be hereafter appointed by law, for holding the Inferior Courts of Common Pleas within the same counties, and may be continued for as many days at each session, or term thereof, as the business of and before such Court shall render necessary or convenient.

4. The Circuit Court may adjourn from any day in session, or term, to any other day in the same session, or term.

Sec. II. *And be it enacted by the authority aforesaid*, That—

1. The Courts of Oyer and Terminer, and of General Gaol Delivery, shall be held in each and every of the counties of this state, at the times and places of holding the Circuit Courts in the same, and at such time and times as the Chief Justice, or any of the Justices of the Supreme Court, shall think it necessary to appoint for any county, on the application to him, made in writing by the Director, or any three of the Board of Chosen Freeholders of the same county.

2. The Courts of Oyer and Terminer, and of General Gaol Delivery, shall have power and authority, to adjourn from any day in session, or term, to any other day in the same session, or term.

REMARKS UPON THE SUPPLEMENT TO THE ACT

Relative to the Supreme and Circuit Courts.

Section I. 1. It cannot be necessary to assign any reasons for increasing the number of Justices of the Supreme Court to five, if the Legislature shall think proper to assign to them the important civil law authorities and duties contemplated.

2. Great delays are occasioned, from the fact of there being but two Circuits in a county during the year, for the trial of causes. Frequently there is a severe struggle for high places on the Circuit calendar. A low place on that list, amounts

almost necessarily, to a postponement of the trial until the ensuing Circuit. Hence notices are put upon the files during one circuit for another, for the purpose of obtaining precedence.

It is submitted to the Legislature, that the establishment of four Circuits a year in each of the counties, will suppress the evil, and advance the purposes of justice.

3 and 4. Require no comment.

Section II. It was esteemed a matter of great convenience some years ago, in the counties of Sussex, Morris, Bergen and Essex, that their Courts of Oyer and Terminer, and General Gaol Delivery, should meet four times a year. Many who were otherwise entirely opposed to the District System, regretted the loss of that feature.

AN ACT

To establish Superior Courts of Common Pleas.

Section I. *Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same,* That—

1. The Chief Justice, or one of the Justices of the Supreme Court of this state, shall hold a Court of record, in each and every of the counties of this state, to be called, the Superior Court of Common Pleas of such county.

2. The said Court shall have and hold four terms thereof in every year, and the said terms shall respectively commence at the times and places appointed, or that hereafter shall be appointed by law for holding the regular and stated terms of the Inferior Courts of Common Pleas in the said counties respectively, and may be continued for as many days, as the business of the said Court shall render necessary or convenient.

3. The said Court may in discretion, adjourn from any day in term, to any other day in the same term.

4. Every day in term except Sunday, shall be a return day.

5. The Clerks of the several and respective counties of this state shall severally and respectively be the Clerks of the said Superior Courts of Common Pleas, to be held in and for the said several and respective counties.

6. The seals of the several and respective counties of this state, shall be the seals severally and respectively of the said Superior Courts of Common Pleas, to be held in and for the said several and respective counties.

Sec. II. *And be it enacted by the authority aforesaid*, That—

1. The Superior Courts of Common Pleas, by this act constituted, shall severally and respectively have cognizance and jurisdiction to hear, try and determine all causes and actions of a civil nature at law, of what kind or description soever they may be; and whether the same be real, personal, or mixed, and to render judgment and to award execution therein according to law and right.

2. In all actions of a transitory nature, the said Court shall, and may have and hold jurisdiction, altho' the cause of action may not have arisen in the same county.

3. In local actions, the jurisdiction and cognizance shall be confined to the proper counties.

Sec. III. *And be it enacted by the authority aforesaid*, That—

The said Court shall have power and authority,

1. To award and issue process for parties, jurors, witnesses and papers, and to compel appearance and obedience according to law.

2. To try issues, and take such inquests by default or otherwise, as ought to be tried or taken in the said Court; to record non-suits and defaults; to take assizes; to set aside verdicts, and non-suits in proper cases, and grant new trials according to law; to pronounce and record judgment either interlocutory or final, or both, as the case may require, in all proper and just cases; and to do and execute all other acts, matters and things, which by law may or ought to be done respecting the premises.

3. The sheriff, coroners, constables of the county and elisors, to be appointed, shall be the ministerial officers of the said Court, and shall execute the writs, precepts and process issuing out of the said Court, and to them respectively directed and delivered, and make true return thereof according to the command in the same.

4. If by reason of challenges, or the default of jurors, or otherwise, a sufficient number cannot be had, of the jurors on the original panel to try the issue or cause; then the Superior Court of Common Pleas is hereby authorized and required, to award a *tales de circumstantibus*, to be joined to the other ju-

rors till the number of twelve jurors be sworn; which talesmen shall be subject to the same challenges as the principal jurors. And thereupon the said Court is hereby authorized to proceed to the trial of the said issue or cause with such jury; which shall be as effectual and valid as if the said issue or cause had been tried by twelve of the jurors on the original panel.

5. If any talesman be called and shall not appear; or if he appear, and shall wilfully withdraw from the Court, with intent to avoid or evade serving as talesman or juror, as aforesaid, then it shall be lawful for the said Court to set a reasonable fine upon him, to be levied by distress and sale.

6. Writs of subpœna issuing out of any of the said Courts, shall be obligatory, upon any witness duly served therewith, within this state in like manner, as if such writs had been issued out of the Supreme Court of this state: and the said Superior Court of Common Pleas, of any county, shall have power to enforce obedience to its writ of subpœna, by attachment to be directed to any sheriff, or other proper officer of any county, whether the said Court shall be holden within the said county, or without the same. And the said sheriff or other officer, shall be subject to all the pains and penalties, for not serving and returning the same attachment, as if it had issued out of the Supreme Court. And the like process and proceedings, may be issued and had thereon in the Superior court of Common Pleas, as are usual and lawful, in the Supreme Court, and with like effect.

7. Each and every of the Superior Courts of Common Pleas by this Act constituted, shall have full power and authority to order trials by foreign juries, in all cases, where it may be proper or necessary: And for this purpose, may, as often as need be, award writs of *venire facies*, *habeas corpora juratorum*, or *distringas*, as the case may require, to the sheriff or other proper officer of any county of this state, from which the jury shall be ordered to come, in the discretion of the said Court; and the Court may compel obedience to the said writ or writs by attachment, fine and imprisonment.

8. The order by any of the said Courts for a trial by a foreign jury, and the proceedings consequent therein, shall be as valid and effectual as if the same cause were pending in the Supreme Court, and the like order were made by that Court, and the consequent proceedings took place therein.

Sec. IV. *And be it enacted by the authority aforesaid*, That—

1. No writ *habeas corpus*, *certiorari*, or other writ, shall be allowed, whereby any cause or proceeding may be removed from the Superior Court of Common Pleas to the Supreme Court, before final judgment in such cause, or before a final decision in such proceeding: But the Supreme Court shall have authority to make an order, to remove into the Supreme Court, any transitory action, pending in the said Superior Court, in which the trial ought to be had elsewhere, than in the proper county of such Superior Court of Common Pleas.

2. Such order for the removal of a cause, shall be made in the Supreme Court upon motion under the like circumstances, and in the like cases, in which if the action were pending in the Supreme Court, that Court would order the venue to be changed into some other county; and in no other cases.

3. Upon filing a certified copy of such order in the office of the Clerk of the Superior Court of Common Pleas, such cause shall be immediately removed into the Supreme Court; and the Supreme Court shall proceed thereon, as if the same cause had been originally brought there; and the Clerk of the Superior Court of Common Pleas aforesaid, shall forthwith deliver to the Clerk of the Supreme Court, all process, recognizances and pleadings, relating to said cause, in his office to be affiled.

4. All recognizances removed as aforesaid, shall be effectual and valid in the Supreme Court; and in case they or any of them, shall be violated or become forfeited, they may be prosecuted in the Supreme Court to effect.

5. All writs of error upon judgments to be entered in any of the Superior Courts of Common Pleas, shall issue out of the Supreme Court, be returnable therein, and therein shall be adjudged of according to law.

Sec. V. *And be it enacted by the authority aforesaid*, That—

1. Any cause pending or to depend in the Inferior Court of Common Pleas, of any county of this state, except as herein after is excepted, may at the instance of either party, and at the sole costs, charges and expenses of such party, be removed into the Superior Court of Common Pleas of the same county, at any time before final judgment by writ of *accedas ad curiam*, *certiorari*, *habeas corpus*, or other proper writ to be devised.

2. The said writ shall issue out of the Superior Court of

Common Pleas, shall be mandatory and shall be obeyed, and shall remove *instanter* the original writ, process, bail, recognizances, orders, pleadings, notices, issue and verdict, if such there be, and all proceedings whatsoever, between the said parties in the suit aforeiaid : to the end, that the said cause be tried, if need be, and judgment rendered, and justice done without denial or delay.

3. After such removal as aforesaid, the said Superior Court of Common Pleas, shall proceed in the said cause, as if the same had been originally there commenced and prosecuted.

4. All recognizances removed as aforesaid, into the Superior Court as aforesaid, shall be as valid and effectual in the Superior Court, as if they had been taken or entered into there ; and in case they, or any of them shall be violated or become forfeited, they may be prosecuted in the said Superior Court of Common Pleas to effect.

5. Lawful and just amendments in process and pleadings, may be allowed after such removal on reasonable and just terms.

6. Any cause removed from the Inferior Court of Common Pleas, to the Superior Court of Common Pleas, may be tried during the same term, to which such removal or return shall be made, or at another term in the discretion of the Court.

7. The *allocatur* for any writ to remove a cause from the Inferior Court of Common Pleas to the Superior Court of Common Pleas, shall be made in term time and in open Court, and not otherwise.

8. Appeals from judgments entered in the Courts for the trial of small causes, shall not be removed from the Inferior Court of common pleas, into the Superior Court of common pleas.

9. No cause, matter, or proceeding of a summary nature or character, shall be removed from the Inferior Court of Common Pleas, into the Superior Court of Common Pleas.

Sec. VI. *And be it enacted by the authority aforesaid*, That—

The costs to be allowed in the Superior Courts of Common Pleas, as between party and party, shall be according to the rules following :

1. In all personal actions to be commenced in the Superior Courts of Common Pleas, the same Costs shall be allowed, which by law are allowed for the like proceedings in the Inferior Courts of Common Pleas.

2. In all actions commenced in the Inferior Court of Common Pleas, and removed to the Superior Court of Common

Pleas, the same costs shall be allowed, which ought by law to have been allowed, if the said cause had not been removed, but had proceeded to judgment and execution in the Inferior Court of Common Pleas.

3. In all actions real or mixed to be commenced or prosecuted, in the Superior Courts of Common Pleas, the same costs shall be allowed for the same services as by law, are allowed in the Supreme Court of this State.

REMARKS UPON THE ACT

To establish Superior Courts of Common Pleas.

This bill is not within the true scope of the directions to me, to prepare and report a system and code in respect to testament and intestacy: but it was drawn at the instance and by the advice of many friends, was reported to the Legislature, was approved of by their committee, and on their recommendation was by the House of Assembly, ordered to be printed with the other bills reported.

In revising the system so far as it respects the Orphans Courts, it seemed to me necessary to commit that branch of the administration of our law, to the Justices of the Supreme Court. Some of the reasons leading to that conclusion, are cursorily set down in the remarks appended to the bill entitled "An act respecting the Orphans' Courts."

It has for many years been an object of desire in New-Jersey, to devise some improvement in our judicial system. That this anxiety should at times have produced crude and perhaps inconsistent theories and plans, is by no means strange. Nor can we wonder that the objections to *them* being strongly set forth, should have prevented *any* improvement to this day. The evil therefore remains, deep, radical, ruinous.

That the Inferior Court of Common Pleas is essentially defective: that from its constitution, its numbers, and other causes, it is utterly incompetent to discharge, with ability and promptness the high functions with which it is entrusted, is no longer a secret. Every day proclaims it. Every suit there tried gives additional evidence of the mortifying fact.

The wise and impartial administration of justice is the great end of all government.

If it shall seem meet to the Legislature to require the Justices of the Supreme Court, to lend their aid in protecting and defending the rights of the widow and the Orphan; if they are to be constituted the Judges of the Orphans' Courts, it seems to follow almost as a matter of necessity, that the Supreme

Court shall consist of five Justices. In that event an opportunity is offered, at a very cheap rate indeed, of establishing a Superior Court of Common Pleas in every county—a tribunal which shall be at once independent, able and impartial.

This will leave the Inferior Court of Common Pleas just where they were. No curtailment of their jurisdiction or authority; no interference with their rights; no president over them to be hated and avoided. Suitors who prefer that jurisdiction, or who are content with it, are neither counselled nor compelled to abandon a favorite tribunal.

Nor is this plan at all repugnant to the Constitution, or the general scheme of our jurisprudence. Nay, it may be argued that the framers of our Constitution contemplated the establishment of some such Court, by legislative authority. It seems to be an absurdity in terms, to say that there is an *Inferior* Court of Common Pleas, without a *Superior*.

Sec. I. 1. Relates to the constitution of the Court.

2. Prescribes the terms, and that the Courts shall meet at the times and places appointed by law, for holding the Inferior Courts of Common Pleas.

3. Gives a power of adjournment *over a day* often times very necessary.

4. Makes every day in term except Sunday, a return day.

5. Ascertains the Clerks of the Courts.

6. The seals in like manner.

Sec. II. Gives cognizance and jurisdiction to the Courts according as I believe, to universal consent.

Section III. The powers conferred in this section and the provisions here made, are usual and ordinary, and are esteemed essential for the faithful administration of the law.

Section IV. Is intended to prevent the removal of causes into the Supreme Court *before trial*, except in certain cases. How cruel an engine of oppression and delay, the present *habeas corpus cum causa* is, every practitioner of the law full well knows. And yet, to destroy its use, because it is susceptible of gross *abuse*, cannot be determined by an enlightened legislature. So long as our system continues as it is, the evils of the *dilatory* writ must be endured, from the assurance of its caution and security in the end.

The exertion of the power of the Supreme Court in changing the venue is by known, certain and just rules. It can scarcely be imagined that it will or ought to be desired, to remove any other action than a transitory one into the Supreme Court from the Superior Court, and then only for the purpose of changing the venue.

It is proposed that the removal, where it is necessary or proper, shall be by rule and without writ: And it is believed that great expenses and delays may be avoided.

1, 2 and 3. Direct the manner of removal and when.

4. Requires no comment.

5. Provides for writs of error, makes them triable in the Supreme Court and leaves the manner of proceeding in them, to the general provisions of law.

SECTION V. 1. Deals out even handed justice, in giving to either party in a suit pending or to depend in the Inferior Court of Common Pleas of any county, *a right* by particular writ, and at his own proper costs and expense, to remove such cause to the Superior Court of Common Pleas of the same county, at any time before final judgment, except in certain cases.

That this removal cannot be effected by rule of the Superior Court without marring or defacing the symmetry of the constitution of these Courts; and that it ought to require a *writ* from the Superior to the Inferior, no one versed in juridical science will think of denying.

2 and 3 Directs that the original writ, process, bail and all other proceedings shall *instanter* be removed, so that the cause may immediately proceed. 4 and 5 Require no comment.

6 and 7 Constitute the exceptions to the right of removal given in I. These matters of course, will be left just as they are, and subject after judgment to the revision of the Supreme Court by *certiorari*.

The right of removal into the Superior Court which is given, it is thought ought to belong to both parties, and of course, to be exerted at the instance of either; but that the party removing, shall do it at his sole costs, charges and expenses, and that of course, he shall not recover such costs from his adversary.

SECTION VI. Seeks to regulate the subject of costs, so that no more expense will be incurred than the existing laws prescribe. The statute can specifically provide for those costs only, which are between party and party; but it is confidently hoped that a large portion of the expenses now incurred, will be in many respects curtailed. The numerous altercations in the Inferior Courts of Common Pleas on questions of order—The disreputable contrivances and squabbles for the *opening* and *reply*—The efforts to *get the last word*, as it is called, produce intolerable delays, and vast expense of time to suitors, jurors and witnesses. Questions are daily brought up for elaborate argument, which have been settled scores of years, and on which it is impossible for juridical men to differ. But there is a *chance* of success—Something *may* be gained—Nothing can be lost—*Tierce* and *Carte* usurp the place of rational debate—Small wit may be played off to effect—The bad jest is the substitute for good argument—The fallacious sophistry of a concluding harange, has all the influence due to sober and digested truth, and the conclusion, is most frequently to the reproach and disgrace of the law, such as from these premises may be expected.

Can this comport with the dignity or the sacredness of the administration of justice?

I make these remarks with great pain: but being required by the Legislature to draw these bills for their inspection, and to annex to them such observations in explanation or otherwise, as shall appear to me just and applicable, I cannot in conscience, suppress what I know to be the truth, and the truth greatly deplored.